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Supreme Court of the United States

OCTOBER TERM 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the record supports the verdict of the jury that the ASME, a private membership organization that administers a program of mandatory standards for the nation's boiler industry, engaged in a combination or conspiracy in restraint of, and to monopolize, the market for boiler water level controls.

2. Whether non-profit private groups that administer industrial standard-setting programs should be exempt from the traditional rules of *respondeat superior* in antitrust cases.

TABLE OF CONTENTS

		PAGE
QUESTIONS PRESENTED		i
TABLE OF AUTHORITIES		iii
STATEMENT OF THE CASE		1
A.	The Parties	1
B.	The Formation of the ASME Conspiracy	4
C.	The ASME Ratifies the Conspiracy	8
D.	The Litigation in the District Court	15
E.	The Appeal	17
SUMMARY OF ARGUMENT		19
ARGUMENT		21
I.	INTRODUCTION	21
II.	THE ASME WAS PROPERLY FOUND LIABLE UNDER THE SHERMAN ACT FOR THE ANTICOMPETITIVE CONDUCT OF ITS AGENTS	23
A.	The Conduct Of Hardin, James and Hoyt Was Within The Scope Of Their Actual Authority	26
B.	The ASME Ratified And Affirmed The Anticompetitive Conduct	33
C.	The ASME Is Responsible For The Acts Of Its Agents Performed Within Their Apparent Authority	35
III.	AS A MATTER OF POLICY, PRIVATE GROUPS THAT EXERCISE UNREGULATED POWER OVER THE ECONOMIC FREEDOM OF OTHERS SHOULD NOT BE EXEMPTED FROM THE TRADITIONAL RULES OF *RESPONDEAT SUPERIOR* IN ANTITRUST CASES	41
A.	The History Of The ASME Demonstrates The Need For The Application Of The Traditional Legal Standard Of Accountability	41
B.	It Is Appropriate That The ASME Should Share The "Risk of Loss" In This Case	47
CONCLUSION		50

TABLE OF AUTHORITIES

CASES	PAGE
Adams-Mitchell Co. v. Cambridge Distributing Co., 189 F.2d 913 (2d Cir. 1951)	39,40
Albrecht v. The Herald Co., 390 U.S. 145 (1968)	23
American Column & Lumber Co. v. United States, 257 U.S. 377 (1921)	24
Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 (1962)	22
Azalea Drive-In Theatre, Inc. v. Sargoy, 394 F. Supp. 568 (E.D. Va. 1975), *rev'd on other grounds*, 540 F.2d 713 (4th Cir. 1976)	39
Bankers Life Insurance Co. v. Scurlock Oil Co., 477 F.2d 997 (5th Cir. 1971)	49
Blalock v. Ladies Professional Golf Association, 359 F. Supp. 1260 (N.D. Ga. 1973)	47
Bowman v. Home Life Ins. Co. of America, 243 F.2d 331 (3d Cir. 1957)	38
Brenner v. World Boxing Council, ___ F. Supp. ___, [1980-81] Trade Cases (CCH) ¶ 63,789 (S.D.N.Y. 1981)	45
Carl Wagner & Sons v. Appendagez, Inc., 485 F. Supp. 762 (S.D.N.Y. 1980)	40
Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980)	50
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	45
Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960)	39
Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962)	22
Dark v. United States, 641 F.2d 805 (9th Cir. 1981)	38
Diamond v. Chakrabarty, 447 U.S. 303 (1980)	45

TABLE OF AUTHORITIES

CASES PAGE

Eliason Corp. v. Nat'l Sanitation Foundation, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980) 47

Employers' Liab. Assurance Corp. v. L. J. Marcotte Ins. Agency, 314 F.2d 470 (8th Cir. 1963) 38

Fashion Originators' Guide v. FTC, 312 U.S. 457 (1941) 24

Federal Prescription Service, Inc. v. American Pharmaceutical Association, ___ F.2d ___, [1981-82] Trade Cases (CCH) ¶ 64,217 (D.C. Cir. 1981) 40

Friedlander v. Texas & Pacific Railway Co., 130 U.S. 416 (1889) 37

Gibson v. Berryhill, 411 U.S. 564 (1973) 47

Gilmore v. Constitution Life Insurance Co., 502 F.2d 1344 (10th Cir. 1974) 26,38

Gleason v. Seaboard Air Line Railway Co., 278 U.S. 349 (1929) 37

Glick v. White Motor Co., 458 F.2d 1287 (3d Cir. 1972) 32

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) .. 45

Gunter Harz Sports, Inc. v. United States Tennis Ass'n, ___ F. Supp. ___, [1981-82] Trade Cases (CCH) ¶ 64,243 (D. Neb. 1981) 47

Henderson v. Croom, 403 F. Supp. 668 (N.D. Ala. 1975) 38

In re F. W. Koenecke & Sons, Inc., 605 F.2d 310 (7th Cir. 1979) 38

Ira S. Bushey & Sons, Inc. v. United States, 276 F. Supp. 518 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968) 38

Izard v. Arndt, 483 F. Supp. 261 (E.D. Wis. 1980) 38

TABLE OF AUTHORITIES

CASES PAGE

J.C.B. Super Markets, Inc. v. United States, 530 F.2d 1119 (2d Cir. 1976) 30
Kerbs v. Fall River Industries, Inc., 502 F.2d 731 (10th Cir. 1974) 38
Klor's Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959) 24
Lewis v. Walston & Co., Inc., 487 F.2d 617 (5th Cir. 1973) 27
Linseman v. World Hockey Ass'n, 439 F.Supp. 1315 (D. Conn. 1977) 47
Marbury Management, Inc. v. Kohn, 629 F.2d 705 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3409 (1980) ... 38
Maxwell Land Grant Co. v. Dawson, 151 U.S. 586 (1894) 22
Mile Branch Coal Co. v. United Mine Workers of America, 266 F.2d 919 (D.C. Cir. 1959) 37
Moscarelli v. Stamm, 288 F. Supp. 453 (E.D.N.Y. 1968) 29
National Acceptance Co. of America v. Coal Producers Ass'n, Inc., 604 F.2d 540 (7th Cir. 1979) 38
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 24
New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909) 27
Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945) 30
Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 656 (1961) 47
Ricketts v. Pennsylvania Railroad Co., 153 F.2d 757 (2d Cir. 1946) 37
Scarano v. Central R.R. Co., 203 F.2d 510 (3d Cir. 1953) 33

TABLE OF AUTHORITIES

CASES	PAGE
Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), *rev'd en banc*, 405 F.2d 215 (2d Cir.), *cert. denied*, 395 U.S. 906 (1969)	26,29,30
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Sennott v. Rodman & Renshaw, 474 F.2d 32 (7th Cir.), *cert. denied*, 414 U.S. 926 (1973)	38,39
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Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	47
Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962)	28,29, 20,40
State Farm Mutual Automobile Insurance Co. v. Worthington, 405 F.2d 683 (8th Cir. 1968)	32
Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154 (D. Ore. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969)	47
Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29 (1944)	22
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. ____, 68 L.Ed 2d 500 (1981)	18
Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 140 (10th Cir. 1966)	38
Truck Drivers' Local No. 421 v. United States, 128 F.2d 227 (8th Cir. 1942)	37
United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922)	36,37
United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971)	30

TABLE OF AUTHORITIES

CASES PAGE

United States v. Beusch, 596 F.2d 871 (9th Cir. 1979) 29

United States v. Cadillac Overall Supply Co., 568 F.2d 1078 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978).. 30

United States v. Continental Group, Inc., Civ. Nos. 76-514, 76-524 (E.D. Pa. 1978) 39

United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir 1979), *cert. denied*, 444 U.S. 1032 (1980) 39

United States v. E. C. Knight Co., 156 U.S. 1 (1895).. 44

United States v. Empire Packing Co., 174 F.2d 16 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949) 30

United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) 30

United States v. Patten, 226 U.S. 525 (1913) 22,24

United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966) 29,40

United States v. Sanchez, 521 F.2d 244 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976) 38

United States v. Singer Manufacturing Co., 374 U.S. 174 (1963) 45

United States v. The American Society of Mechanical Engineers, Inc., [1972] Trade Cases (CCH) ¶ 74,029 (S.D.N.Y., consent decree filed June 13, 1972) 9

United States v. Topco Assocs. 405 U.S. 596 (1972) ... 42,45

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 24

TABLE OF AUTHORITIES

	PAGE
STATUTES AND RULE	
Federal Rule of Civil Procedure 51	22
Securities Exchange Act of 1934, 15 U.S.C. § 77 *b et seq*	39
Securities Exchange Act of 1934, 15 U.S.C. §78t(a)	38
Sherman Act, 15 U.S.C. § 1 *et seq*	*passim*
MISCELLANEOUS	
American Bar Association Antitrust Section, *Antitrust Civil Jury Instructions* (1980)	39
American Bar Association Antitrust Section, *Jury Instructions in Criminal Antitrust Cases 1964-1976* (1978)	39
Barber, *Control and Responsibility in the Professions*, Pol. Sci. Q. 599 (Winter 1978-79)	46
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Freeman on Judgments §631 (5th ed. 1925)	33
Harper & Kime, *The Duty to Control the Conduct of Another*, 43 Yale L. J. 886 (1934)	46
D. Hemenway, *Industrywide Voluntary Product Standards* (1975)	47
E. Layton, *The Revolt of the Engineers* (1971)	44
Legality of a Proposed Standard Certification Program, 78 F.T.C. 1628 (1971)	47
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TABLE OF AUTHORITIES

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PAGE

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STATEMENT OF THE CASE

A. The Parties

Petitioner, The American Society of Mechanical Engineers, Inc. ("ASME"), is a private membership association of mechanical engineers. Through its governing Council and a staff of full-time officers and employees the ASME conducts a variety of professional activities of interest to its members. In addition to these activities, through committees and subcommittees of members and non-members, the ASME develops and publishes a large number of industry codes and standards. Revenue from the sale of these codes and standards, and from associated product "Certification Programs," accounts for the great bulk of the ASME's income and supports the society's educational and professional activities. *See* n. 41 *infra.*

One of the industry codes administered by the ASME is the Boiler and Pressure Vessel Code (the "Code") which sets certain standards for boilers, pressure vessels and their appurtenances. An implicit purpose and the obvious effect of the Code, as indeed with all standard-setting and certification programs, is to keep non-complying products off the market. Because the Code has been incorporated by reference into the laws of nearly every state and province in the United States and Canada, compliance with Code standards is literally mandatory if a boiler or pressure vessel manufacturer, or a manufacturer of boiler water level controls (the product involved in this case),[1] is to be able to market such a product in the United States or Canada. *See* PX 30A at Exhibit H (App. 666); App. 230-32, 422-23, 474-76; ASME Br. 5.[2]

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[1] A boiler water level control senses when the water level in a boiler reaches the minimum point established by the manufacturer and then automatically either adds water to the boiler (a "feed water" control) or shuts off the heat supply to the boiler (a "low water fuel cut-off" control).
acquired a controlling interest in Hartford through Hartford Fire Insurance

[2] Citations to the record and appendix will follow the same format as that utilized in the ASME Brief (ASME Br. 2 n.*). The underlining and marginal notes in the trial transcript as contained in the photocopied Joint Appendix in the Court of Appeals are solely the responsibility of the ASME and its counsel.

The Code is written, revised and interpreted by the ASME through its Boiler and Pressure Vessel Committee (the "Main Committee") and subcommittees of the Main Committee pursuant to an express delegation of authority from the ASME Council. AX V. 174. The ASME is the only private standard-setting body that regularly issues interpretations of its "codes." App. 646. The Code provisions covering boiler water levels controls fall within the jurisdiction of the "Section IV Subcommittee" of the Main Committee. Many of the Committee and Subcommittee members are employed by corporations or firms having a commercial interest in some aspect of the boiler industry and which continue to pay the committee member's salary and expenses while he is engaged in ASME activities. *E.g.*, PX 16A at 188 (HX V. 196; App. 499, 502), J.A. 110.

In 1971, Mr. T. R. Hardin was Chairman and Mr. John W. James was Vice Chairman of the Section IV Subcommittee. Hardin was a Vice President of Hartford Steam Boiler Inspection and Insurance Co. ("Hartford"), the nation's largest insurer of boilers, and James was Vice President, Engineering, of McDonnell & Miller, Inc. ("M&M"), the nation's largest manufacturer of boiler water level controls.[3] Hardin had been a member of the Main Committee since 1949 and had been Chairman of the Section IV Subcommittee since 1963. PX 30A at "Defendant's Answers," pp. 15-16. James, who played a major role in revising the Code provisions relating to boiler controls, had been with M&M since 1948 and for 23 years he had acted as a member, Vice Chairman and Chairman of the Section IV Subcommittee. *Id.;* App. 853; PX 3 at Exhibit 1 (HX V. 61-62; App. 561-62), J.A. 85-87. As far as the ASME could tell, during that time no officer or employee of any other manufacturer of boiler water level controls served on the Main Committee or any of its subcommittees. App. 701-03, 709-10; J.A. 76-81. *See also* PX 16A at 189-90 (testimony of Mr. James). M&M recognized the value of James' status and power at the ASME in a 1973 memorandum by a top company official:

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[3] In late 1970, International Telephone and Telegraph Corp. ("ITT") acquired a controlling interest in Hartford through Hartford Fire Insurance Co. (App. 940-41) and in early 1971 ITT was negotiating to acquire M&M. ITT finally acquired M&M on December 12, 1971.

> A major reason for the continued success at M&M is a result of [James'] efforts and skill in influencing the various code making bodies to "legislate" in favor of M&M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M&M market penetration of 70 plus %. . . . It is of vital importance to M&M to maintain the continuity of John's influence as above. . . . In this circumstance his seniority is a distinct plus for both experience and influence.

HX V. 61-62, J.A. 85-87.

M&M was founded in 1920 by the late E. N. McDonnell and has traditionally maintained 75% to more than 85% of the boiler water level control market. ASME Br. 3. This market success was achieved despite the "impediment of being higher in market price than its competitors." PX 33A at 352, 354 (HX V. 632, 634; App. 583).

M&M's product employed the "float" principle, whereby a floating bulb would, in theory, drop with a falling water level, thus activating a switch through a mechanical linkage, much the same as the "float" in the household toilet tank. In practice, however, the "float" experienced many types of malfunction. Sedimentation, corrosion and mechanical blockage of its moving parts over time were the principal causes of failure for "float" controls. App. 359-69.[4] Despite these shortcomings, M&M chose to stick with the "float" (PX 14 at 43-45 (HX V. 163-65; App. 569, 570)), and sought to perpetuate its market dominance through favorable ASME "legislation."

Hydrolevel Corporation ("Hydrolevel") was organized in 1965 by the late Michael DeLeonardis, his son Dominick and the late Russell Rymer. Like M&M, the new company manufactured and sold only one product: its newly-developed,

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[4] There were nearly 100 major boiler failures in the U.S. in 1971 which were attributed to the failure of water level controls. PX 12A at 8 (App. 566, 567). Although failures of M&M controls occurred at a significant rate and resulted in substantial property damage and personal injury (PX 32 (HX V. 523-626; App. 582)), Hydrolevel controls had never been known to cause such problems. App. 199, 781.

revolutionary, horizontal "probe-type" boiler water level control. Unlike the "float" control, Hydrolevel's "probe" control used no moving parts. It consisted of a single horizontal electrode, with a unique configuration patented by Michael DeLeonardis, where the boiler water itself completed an electric circuit. When the water level dropped below the electrode, the circuit was broken and thereby cut off the fuel supply to the boiler or activated a pump to refill the boiler with water. Hydrolevel's probe was "fail-safe," meaning that if the circuit was broken by a failure of the control, the fuel supply would be cut off, a safe condition. It has never experienced a malfunction. App. 199, 781; PX 18B at 166 (HX V. 340; App. 498, 502). Indeed, despite the remark by the Court of Appeals that there was an "engineering debate over which kind of cut-off is better . . ." (A-5), the evidence at trial was uncontroverted that the Hydrolevel product was a significant advance over prior technology. App. 382-88, 406-09, 419-21, 940, 1105, 1272-75, 1648-50; PX 11 at 96-97 (HX V. 86-87; App. 565-66); PX 26 at HT 86, 559, 574-75, 609, 612 (App. 154); PX 46 (HX V. 810-11; App. 249).

The new company attracted immediate and substantial financial support from the venture capital subsidiary of the Chase Manhattan Bank. A few years after it was organized, Hydrolevel had developed a nationwide sales coverage and a productive capacity, which it never had a chance to utilize, to manufacture 100,000 controls (more than 20% of the market) annually. App. 164-66; 176-77; HX V. 632-33.

B. The Formation of the ASME Conspiracy

The Brooklyn Union Gas Co. ("BUG") was an innovative leader in the utility field as well as a major merchandiser of heating boilers in its own right. App. 354. BUG had been very dissatisfied with the M&M "float" on its boilers as a result of numerous and costly warranty-covered boiler losses. App. 358-62. BUG therefore had been looking for a more reliable control and in 1969 the Hydrolevel product caught its attention. After some additional design work which radically reduced the price of the Hydrolevel control (App. 178-79), BUG and one of its boiler manufacturer-suppliers, Weil-McLain, Inc., subjected

the Hydrolevel probe to extremely rigorous testing. App. 384-85, 391-97, 413-19. The Weil-McLain tests demonstrated that under highly unusual and artificial laboratory conditions the water in a steam boiler would surge and bubble so that the probe's electrode would be alternately covered and uncovered, producing an undesirable off-on-off "chattering." Hydrolevel therefore incorporated a time delay feature into the control circuit of the probe which, by retarding the operation of the cut-off for a few seconds after the electrode was uncovered, prevented the "chattering" that had been the only even theoretical problem found to exist with the Hydrolevel probe.

In early 1971 BUG determined to standardize on Hydrolevel controls for *all* boilers sold by BUG and to require replacement of faulty M&M controls with the Hydrolevel product. App. 179, 387-88, 400-01, 416; HX V. 301-08. Moreover, at the same time, the Hydrolevel control received the endorsement of the Factory Mutual Insurance Co. as a "fail safe" control. HX V. 99, 499 (A). These important endorsements by two of the industry's major factors poised Hydrolevel for a market breakthrough while it still had the only horizontal probe control on the market.

To counter this new competitive threat to M&M's monopoly position, two meetings were held in Chicago in March of 1971. The first meeting was attended by Messrs. Hardin and James and Eugene Mitchell, M&M's Vice President of Sales. The second meeting, over dinner at the Drake Hotel, was joined by James Solon, M&M's new President. One of the subjects discussed at these meetings was how the Code would be applied to a control with a time-delay. HX V. 197-98; PX 18A at 378-86 (HX V. 309-17; App. 498-99). The participants to the meetings conceded that they clearly understood that the product under discussion was the Hydrolevel control. HX V. 173-75, 202-03, 317.

It was decided at these meetings that M&M would send a letter to the ASME inquiring whether a time delay was acceptable under the Code. HX V. 206-10, 213-16, 318-19. According to Solon, Hardin told M&M to put the inquiry letter into a "definite form" so that it would elicit the desired

response, *viz.*, that the Hydrolevel product didn't comply with the Code. HX V. 173-74. James and Hardin not only discussed the inquiry and exchanged correspondence as to its language (HX V. 209-10, 216-24, 321-24), but they also discussed the substance of the response which M&M would receive from the ASME. HX V. 231-32, 236-37, 247-52, 323.[5]

The result of these conversations and correspondence was an M&M letter dated April 12, 1971, drafted by James (with Hardin's assistance) but signed by Mitchell to avoid the appearance of a conflict of interest on the part of James. PX 38 (HX V. 388; App. 215-16), J.A. 62; HX V. 225-30, 320-28. The letter was addressed to the Secretary of the Main Committee, Mr. W. B. Hoyt, the ASME officer expressly delegated the responsibility by the ASME's governing Council for responding to inquiries seeking interpretations of the Code and for "supervising" the activities of the Main Committee. J.A. 120; AX V. 174, 179-181.

The April 12 letter asked whether it was consistent with the "intent" of Para. HG-605 of the Code to have a time delay feature on a low-water fuel cutoff. J.A. 62. The letter was referred by Hoyt (who, despite his responsibilities, had no expertise in this area) to Hardin, as Chairman of the Section IV Subcommittee. After Hardin and James collaborated on the wording of the ASME response, on April 27, 1971, Hardin sent his proposed language to Hoyt, with copies indicated to the Chairman and Vice Chairman of the Main Committee,[6] for incorporation into a formal ASME reply. The ASME response was signed and issued by Hoyt (on ASME letterhead) the same day it was received from Hardin, April 29, 1971, and in exactly

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[5] The ASME file of correspondence between James and Hardin on this subject was later destroyed by James after he was tipped off by Mr. W. B. Hoyt, the Main Committee Secretary (and full-time ASME officer), that the matter was being investigated by a *Wall Street Journal* reporter. HX V. 247-49. *See* p. 12 *infra*.

[6] At p. 37 n.* of the ASME Brief, it is claimed that the April 29, 1971 letter "passed review" by the Chairman and the Vice Chairman of the Main Committee. To the contrary, there is absolutely nothing in the record to indicate that those gentlemen "reviewed," saw or even received copies of Hardin's draft, which was issued by Hoyt immediately after he received it.

the language Hardin had proposed. *Compare* J.A. 63 *with* PX 39 (AX V. 10), J.A. 64. Despite the fact that the ASME internal procedures labelled such a letter "unofficial," it was, as far as Hoyt and the public were concerned, the "official" pronouncement of the ASME. App. 192; J.A. 115, 125-26. A photocopy of the letter is appended to this Brief.

There was conflicting evidence at trial as to whether the manner in which Hardin and Hoyt handled the M&M inquiry and the ASME's response was "routine," "regular" and "according to standard ASME procedures," as argued by the ASME, or whether it was irregular. According to the internal procedures of the Main Committee, under certain circumstances Subcommittee Chairmen could respond to public inquiries concerning the Code when referred to them by the Secretary of the Main Committee. AX V. 184. The ASME introduced evidence that Hoyt acted strictly according to established ASME procedures in referring the inquiry to Hardin for response, that Hardin acted according to ASME procedures in drafting the reply for Hoyt's signature and that Hoyt did nothing unusual in sending the letter out to M&M immediately upon receipt of the draft from Hardin. App. 863-65, 903-04; PX 18C at Exh. 5 (AX V. 7; App. 573); AX V. 6; J.A. 63-64; ASME Br. at 5-6, 8-9. Hydrolevel took the position that Hoyt and Hardin handled the inquiry and response in a manner inconsistent with "standard ASME procedures," that this justified the inference that Hoyt was aware of the scheme concocted by Hardin and James and that Hoyt's actions ensured that success of the plan. *Compare* PX 9B (AX V. 3-6; App. 564) *with* J.A. 121-26; HX V. 262-63.

The April 29, 1971 ASME letter consisted of two substantive paragraphs. Hydrolevel argued that the first paragraph of the letter set forth a standard not in the Code and that the second paragraph expressly questioned whether a low-water cutoff with a time delay could ever meet that standard. The clear but false implication of the entire ASME letter was that such a control could *not* meet the ASME Code. AX V. 133-36. This position was supported by the opinion of the *ASME's own expert witness* after seeing the misleading ASME letter for the first time and was also the reaction of a member of the ASME's

Main Committee. PX 2 at 113-21 (AX V. 129-37; App. 560-61), J.A. 83, 113. Nevertheless, the ASME contended that the April 29, 1971 letter was accurate and not misleading, was not "rigged," and was "a perfectly sensible reading of the code." App. 929-30, 1100.

M&M immediately distributed the ASME response and discussed it with various boiler manufacturers, including the boiler suppliers to BUG, and with other firms in the boiler industry. ASME Br. at 9.[7] M&M also produced a sales kit titled "The Opposition, Who They Are and How to Beat Them" (HX V. 473-95), which was used by M&M sales representatives with customers and which included a copy of the ASME letter. The kit identified Hydrolevel by name and flatly stated that the Hydrolevel product did not meet the Code. The entire industry was therefore "educated" that the Hydrolevel product did not comply with the Code. Except for orders from BUG (which stuck to its decision to standardize on Hydrolevel), Hydrolevel's sales flattened out; none of the boiler manufacturers supplying BUG who had seen or heard of the ASME letter bought Hydrolevel controls for boiler sales other than to BUG. App. 223-24, 229-33.

C. The ASME Ratifies the Conspiracy

Hydrolevel remained unaware of the existence of the April 29, 1971 ASME letter for nearly nine months, until January, 1972, when one of BUG's boiler suppliers told Dominick DeLeonardis that he did not want to buy the Hydrolevel product (despite the BUG specification) because *it did not meet the Code as reflected in an ASME letter.* App. 186; J.A. 114-15. The supplier refused to tell DeLeonardis more about the letter because he had promised to keep silent when it was shown to him. J.A. 114-15.

DeLeonardis wrote directly to Hoyt at the ASME on January 25, 1972 and demanded a copy of the letter. PX 40

[7] On April 20, 1971, *nine days before the ASME letter went out,* but obviously already aware of the content of the ASME's forthcoming letter, M&M's Gene Mitchell telephoned BUG and stated that the Hydrolevel control did not meet the Code. App. 402-05; HX V. 384(A)—(B).

(HX V. 754; App. 215), J.A. 65. Hoyt's assistant wrote back on February 8, 1972 by quoting the body of the April 29, 1971 letter but omitting the name and address of M&M, the addressee, and deleting the sentence which showed who drafted the response. PX 41 (AX V. 22; App. 215), J.A. 66-67; App. 187-93. A photocopy of the letter is appended to this Brief. Thus frustrated, and still unable to identify the principals in the matter, Hydrolevel's President, Russell Rymer, wrote to Hoyt on March 23, 1972, with copies to every Main Committee and Section IV Subcommittee member, demanding that the ASME permit Hydrolevel to confront its accusers and, despite the serious damage that had already occurred, that a corrective statement be circulated "among all who might reasonably have become privy to [the April 29th] letter." J.A. 68-73. On March 27, 1972, Hoyt replied enclosing a redacted copy of the original letter, again leaving out the critical identification of those who were behind the scheme. PX 16B at Exhibit 25 (AX V. 38-39; App. 570, 591), J.A. 74-75. At no time did the ASME ever give Hydrolevel a complete copy of the original April 29, 1971 ASME letter. App. 195.[8]

On May 4, 1972, the full ASME Section IV Subcommittee held a meeting to discuss the demands made in Hydrolevel's March 23, 1972 letter and to consider a formal ASME response. At that meeting John James, by then having been promoted to

[8] It was precisely at that time that the ASME was negotiating to settle unrelated antitrust conspiracy charges which had been filed in 1970 by the U.S. Department of Justice and which challenged the exclusion, through the Code, of foreign boilers from the U.S. market, an exclusion which obviously benefitted many of the employers of the ASME's "code developers." *United States v. The American Society of Mechanical Engineers, Inc.*, [1972] Trade Cases (CCH) ¶ 74,029 (S.D.N.Y., consent decree filed June 13, 1972). Indeed, the "potential legal involvements" of the Hydrolevel case were the subject of correspondence circulating among James, Hoyt and other senior ASME officials at the same time Hydrolevel was still struggling to investigate the circumstances of the 1971 ASME letter. HX V. 266-70. Hoyt even warned James to be careful in his future ASME correspondence to downplay his position with M&M and thus to "avoid any unpleasant misinterpretations by the Justice Department or others." *Id.* There is no question that the top levels of the ASME were fully aware of the antitrust dangers involved in "code developing" activities by those with a commercial interest in the market.

Chairman of the Subcommittee, stepped down briefly from the chair during the Hydrolevel discussion, thereby admitting that his position in the matter involved a conflict of interest. J.A. 111-12; App. 808-11. The Subcommittee voted to re-issue the April 29, 1971 letter with the second paragraph deleted. This decision was reported to the Main Committee at its meeting the following day by James, a meeting in which James fully participated. As Melvin Green, the ASME's Managing Director of Codes and Standards explained it, James' conflict of interest had importance only at the Subcommittee level, not at the Main Committee level. App. 806-11; J.A. 118-19.

Because a few Main Committee members wanted the ASME response specifically to state that a time-delay was not prohibited by the Code, it was decided to prepare a more elaborate response to Hydrolevel than that proposed by the Subcommittee. The job of drafting a suitable response was delegated by Mr. Zick, the Chairman of the Main Committee, to a two member "Task Group," made up of long-time subcommittee members Harrison and Dow. James, however, dissatisfied that the Main Committee did not rubber-stamp the Subcommittee's decision simply to re-issue the first paragraph of the original letter, was permitted to participate in the drafting process.[9] James specifically suggested a concluding paragraph for the ASME's draft response which Harrison incorporated *in haec verba* into the suggested official reply and which, in referring to the time-delay's acceptability under the Code, was cautionary in tone and not even vaguely corrective of the original letter. AX V. 48-54, 68-69, 73-74. The response, as finally drafted, expressly *"confirmed the intent" of the original letter* but made no specific reference to the original April 29, 1971 letter that had been so widely distributed. PX 45 (AX V. 77; App. 216), J.A. 84; HX V. 240-44. This is the letter that the Court of Appeals later decided was a "retraction" of the original letter, a finding clearly at odds with the jury's verdict.

[9] At the Main Committee meeting, in connection with the discussion whether to "reaffirm" the first paragraph of the original letter, one committee member remarked that "[i]f I were the man receiving that [first paragraph] I would read it as prohibiting my device." J.A. 83.

(footnote continued on next page)

James himself circulated the final draft of the ASME response to the members of the Section IV Subcommittee on May 22, 1972. In his cover letter, James noted that the proposed response was "somewhat at variance" with what the Subcommittee had decided to do at its May 4 meeting because, he falsely represented, some of the Main Committee members wanted the response to state that a time-delay was permissible "with limitations." The "limitations" in the last paragraph of the draft had, of course, been supplied by James. AX V. 70, 73-74. The draft response was also mailed to all of the members attending the Main Committee meeting as the sixth appendix to over fifty pages of minutes. App. 837; AX V. 60-67.[10]

When no member of the Main Committee objected to the draft letter, it was finalized without substantial change and sent by the ASME *only to Hydrolevel* on June 9, 1972. A photocopy of the letter is appended to this Brief. It is important to note that at no point in the entire process leading up to the issuance of the June 9, 1972 "official" letter was there even the slightest suggestion that Hoyt's original April 29, 1971 letter was unauthorized, *ultra vires* or otherwise not binding upon the ASME, or that Hardin or Hoyt had acted outside the scope of

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(footnote continued from previous page)

There was a good reason for James to persist in his effort to eliminate Hydrolevel. At that time he was working within the ASME to extend the Code's coverage to a broader class of boiler products for which a probe control was particularly suitable. HX V 362-63. M&M, under the direction of James, was at the same time busily trying to "invent around" the Hydrolevel patents and was developing a competitive horizontal probe of its own, which it finally brought to the market in 1974. App. 244; PX 11 at 36-43, 49-57.

[10] The conclusion of the Court of Appeals that the draft June 9, 1972 letter had been given wide distribution by the ASME to "over 300 people active in the boiler market" (A-23), was based upon a mischaracterization of the facts in the ASME's Brief to the Court of Appeals. The draft letter was sent to the *186* (not "over 300") people on the list of attendees at the committee meetings on May 4 and 5, 1972. J.A. 76-81; App. 673. After eliminating 34 names that are repeated more than once, 21 employees of ITT, Hartford and ASME, 12 foreigners and 27 duplicate company representatives, only 92 names remain of the original 186. Of those 92, only one recipient of the draft response was employed by a substantial purchaser of controls (J.A. 76-81; PX 35A (HX V. 710-11; App. 582-83)), and there is nothing in the record to indicate that this person, or any other alleged recipient, noticed the draft letter buried in the mass of routine committee material.

their authority in issuing it. Moreover, nothing in the record indicates that anyone at the ASME or any customer or potential customer of Hydrolevel considered the June 9, 1972 letter to have "retracted" the original April 29, 1971 letter or that the letter was anything other than a "confirmation" of the original letter.[11] To the contrary, there is evidence in the record that the few people who were shown the letter by Hydrolevel *still* considered the Hydrolevel product to be unacceptable under the Code. J.A. 117; App. 346-47.

Two years later, in the Spring of 1974, Priscilla Meyer, a reporter for the *Wall Street Journal,* took an interest in Hydrolevel's plight. When Miss Meyer contacted Hoyt asking for the identity of the author of the April 12, 1971 inquiry, Hoyt promptly tipped off James that a reporter had been asking questions about the Hydrolevel affair. HX V. 247-49, 513. James' immediate reaction was to destroy the ASME's file on the subject, including the only known copies of the Hardin-James correspondence, because he was "scared." HX V. 257-59. Miss Meyer's article was published on July 9, 1974. PX 5 at Exhibit 13 (AX V. 88-90; App. 563), J.A. 94-98.

In response to the *Wall Street Journal* article, ITT's lawyers prepared a letter for James' signature to the ASME (on ASME letterhead). J.A. 91-93. This letter, dated August 9, 1974, admitted many of the key allegations in the *Journal* article, including the fact that M&M had been using the letter with potential Hydrolevel customers, but denied (falsely) that he, James, had participated in the drafting of the April 29, 1971 letter. *Id.* Also in response to the *Journal* article, Mr. Paul T. Howse, Jr., an ASME Vice President and a member of the ASME's governing Council (App. 751-52), wrote the President of the ASME on July 25, 1974 that if the facts as stated in the *Wall Street Journal* were true, the ASME had been unfairly restraining Hydrolevel from marketing its product and that Mr.

[11] Trial counsel for ASME stipulated that the ASME never published any statement in its *Mechanical Engineering* magazine or in any other trade publication indicating that the Hydrolevel boiler water level controls met the ASME Code and never sent a letter of apology to Hydrolevel. App. 753-54. Moreover, the ASME never made any effort to identify those people who had been "educated" by M&M with the April 29, 1971 letter and never attempted to contact anyone who had received the letter in the first instance.

James should be relieved of his committee duties and expelled from the ASME for "unethical conduct." J.A. 99-100. If the *Journal's* facts were accurate, Mr. Howse said, a full page apology to Hydrolevel should be published "in all pertinent trade publications stating the facts and affirming that the Hydrolevel Control does meet ASME codes." *Id.* He urgently requested immediate Executive Committee consideration of the matters disclosed by the article. *Id.*[12]

Not only was Mr. James not removed from his ASME duties, even after his own letter showed the *Journal's* facts to be correct, but Mr. Howse's requests were never even placed on the ASME Executive Committee agenda. App. 753-56. Instead, the ASME's "Professional Practice Committee" purported to conduct an investigation of the "entire incident" in late 1974, and, *without even interviewing* Mr. James or any of the other participants in the creation of the April 29, 1971 letter, promptly "found no basis for further consideration of the issue . . . ." App. 801-06; PX 17A at 99 (HX V. 289; App. 572-73); J.A. 103-04. The result of this non-inquiry was an ASME resolution dated November 19, 1974, drafted by the Professional Practice Committee and later edited and published in the ASME's national magazine, *Mechanical Engineering.* App. 801; J.A. 101-04. The resolution was *cleared as to content with James himself,* pointedly "commended" Mr. James for "conducting himself in a forthright manner" and castigated the *Wall Street Journal* for "harrassing" James and other ASME Committee members for activities *"in their line of duty."* App. 801-04; HX V. 284-93; J.A. 103-04. (emphasis added).

In the Summer of 1974, while the staff of the Senate Antitrust and Monopoly Subcommittee was preparing for hearings on "voluntary" standard-setting, they noticed the *Wall Street Journal* article and conducted interviews of the principal actors. It was during the staff's interview of John James, and in the subsequent public hearing, that James disclosed his destruction of the ASME's file. HX V. 253-56.[13] The Senate Hearings

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[12] The district court described Mr. Howse's letter as a "very powerful indication that the highest level" of the ASME was fully aware of the full implications of the scheme. App. 758-59.

[13] *Voluntary Industrial Standards, Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975).

prompted a second *Wall Street Journal* article on April 7, 1975, which caused Mr. William A. Shearer, Jr., another member of the ASME Council (App. 792-93), to write to the ASME on April 16, 1975 condemning James' role in the Professional Practice Committee's "James resolution" and taking the ASME to task for not "ferret[ing] out more information." J.A. 108-09. He urged that Mr. James at least be *interviewed* by the ASME and requested that procedures be set up within the Professional Practice Committee to counter the charge that "codes are self-serving to some of the supporting organizations." *Id.* *Not one* of Mr. Shearer's recommendations was acted upon by the ASME and, although the "James investigation" was later "re-opened" by the ASME, it was again promptly adjourned, this time indefinitely.[14] The ASME has continued to close ranks around Hardin, James and Hoyt until this very day; no action has ever been taken by the ASME against anyone in connection with this matter. HX V. 294.

The industry perception that Hydrolevel's product did not meet the Code proved impossible to overcome while Hydrolevel's "window of opportunity" was still open, *i.e.*, before M&M, still dominating the industry as a unit of ITT, brought out its competitive probe in 1974. App. 233-34, 346-47, 473-87, 937-39; HX V. 499, 507-08, 774-75. When that fact became obvious, Hydrolevel's source of financing "pulled the plug." App. 1399-400. On January 9, 1979, after several more years of flat U.S. sales[15] and after the funds received from the settlements in this case were exhausted, Hydrolevel's assets, except for this lawsuit, were sold for "salvage value."

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[14] According to the ASME, the last "investigation" was adjourned on advice of counsel because of the pendency of this lawsuit. ASME Ct. of App. Br. 14. By thus permitting "business as usual" to continue at the ASME for the last nine years, the ASME not only sealed Hydrolevel's fate, but demonstrated a total lack of interest in preventing recurrences of the same anticompetitive behavior. We think it obvious that no meaningful internal investigation will ever be resumed if the ASME's vicarious liability arguments prevail in this Court.

[15] There was a markedly different commercial acceptance of the Hydrolevel product in the untainted but far smaller Canadian market where the ASME letter was not circulated. In that market the Hydrolevel probe virtually *displaced* the M&M float in a short period of time. App. 506-14.

D. The Litigation in the District Court

Hydrolevel filed this action in August, 1975 naming the ASME, Hartford and ITT as defendants. By June of 1978, suffering continuing financial reverses and after more than three years of pretrial proceedings, Hydrolevel had settled with ITT and Hartford for a total of $800,000, expressly preserving its right to proceed against the remaining defendant ASME for the balance of its damages. App. 47-50. An amended complaint was filed charging the ASME, *inter alia,* with having engaged in a combination and conspiracy in restraint of trade and to monopolize the boiler water level control market, in violation of Sections 1 and 2 of the Sherman Act.

A bifurcated jury trial began on January 22, 1979, before the United States District Court for the Eastern District of New York, the Honorable Jack B. Weinstein, presiding. ASME's trial strategy was designed to obtain total exculpation, not only for the ASME, but for Hardin, James and Hoyt as well. As noted above, *supra,* p.7-8, the ASME took the position at trial that the ASME's April 29, 1971 letter was an accurate and proper product of its code-developing machinery and that the ASME stood by it. The ASME *never* pleaded, proved or even argued that the June 9, 1972 letter was a "retraction" (because it continued to claim that there was nothing to "retract") or that the ASME ever withdrew from a conspiracy to restrain Hydrolevel's trade (because it continued to claim that there was no such conspiracy). Alternatively, the ASME argued that even if there was a conspiracy to create a misleading interpretation, it should not be held responsible for it because "the ASME" (now conveniently defined to exclude Committee officers like Hardin and James because they were "volunteers") did not know of it and could not have benefitted financially from the elimination of Hydrolevel.

The proposed jury instructions submitted by both sides were almost identical with respect to the general principle of corporate liability for the acts of agents and employees, and both sides requested a charge covering actual *and apparent* authority under general agency law principles. Hydrolevel's

proposal would have instructed the jury that an "intent to benefit" the ASME was not necessary for liability and the ASME's proposal would have required the ASME to have actually "profited" from the activity. *Compare* Hydrolevel Requested Jury Charge No. 28 *with* ASME's Requested Charge No. 4, J.A. 59-61.

The district court adopted virtually all of the ASME's proposed requests to charge, including its proposed liability charge. App. 964, 966, 1172-73; J.A. 47-48. Furthermore, the court charged the jury that unless "ratified or adopted" by the ASME, acts by ASME agents or employees done for their own benefit or for the benefit of others, and not for the ASME's benefit, could not bind the ASME. J.A. 49. Judge Weinstein explained to the jury, however, that "benefit" did not necessarily mean "gain" but that the jury could, and should, consider the "motive" of the agent in deciding whether he was acting for the "benefit" of the organization. J.A. 48.

The Court expressly charged that the jury could find the ASME liable if it concluded that the ASME had ratified or adopted the acts of its officers and agents even in the absence of an "intent to benefit." App. 1175; J.A 49. On this point, Judge Weinstein instructed the jury to consider ASME's "action or failure to act, when the actions of individual staff or committee members came to wider attention within the defendant." App. 1181, J.A. 52. *ASME's counsel declared that the court's charge to the jury was "satisfactory."*[16] App. 1192, J.A. 58. With the approval of ASME counsel, a transcript of the charge was given to the jury and a general verdict for the plaintiff was returned under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2.

The damage phase of the trial, before the same jury, resulted in a verdict in favor of Hydrolevel in the amount of $3.3 million, considerably less than the $5.3 million which plaintiff's evidence indicated was the minimum estimated damage sustained by Hydrolevel, but well within the range that the

[16] The only aspect of the charge to which the ASME took exception was the Court's refusal to charge the jury as to certain comments by Hydrolevel's counsel, a matter that is not at issue here.

ASME's own damage expert considered reasonable. App. 1632-33. ASME's post-trial motions were denied. AX V. 216-35; J.A. 7. Judge Weinstein then deducted the amounts of the ITT and Hartford settlements from the verdict before trebling, denied plaintiff's application for the award of a reasonable attorneys' fee, and entered judgment against the ASME for $7.5 million.

E. The Appeal

Both sides appealed to the United States Court of Appeals for the Second Circuit. The ASME argued that the evidence did not justify the jury's liability verdict under either the "benefit" or the "ratification/adoption" standards contained in Judge Weinstein's vicarious liability charge.[17] Hydrolevel, in opposition, contended that there was abundant evidence in the record from which the jury could have properly inferred that Hardin, James and Hoyt acted on behalf of, or for the "benefit" of, the ASME or that the ASME "ratified" or "adopted" their acts. The ASME continued to insist that the April 29, 1971 letter "provided a common-sense and reasonable interpretation of the Code" which was entirely consistent with the ASME's "objectives of and procedures for protecting public safety." ASME Ct. of App. Reply Br. 2, 3. It was never suggested to the Court of Appeals that the June 9, 1972 letter should be viewed as a "retraction" or a "withdrawal" from the conspiracy.

The Court of Appeals determined that it was *not necessary* to resolve the question whether the record supported the jury's verdict under the "benefit" or "ratification/adoption" charge given by the court[18] because that charge was more favorable to the ASME than the law required. The Court said that neither an "intent to benefit," nor "ratification" was necessary for the

[17] The ASME also attacked the propriety of the jury's damage verdict. Hydrolevel appealed the district court's denial of attorneys' fees as well as the deduction of the settlement amounts prior to trebling.

[18] A-13. The ASME's Brief incorrectly claims that the Court of Appeals "tacitly assumed" that such evidence was lacking. ASME Br. 27.

ASME to be bound by the actions of Hardin, James and Hoyt in the circumstances of this case because these men had clearly been given the "apparent authority" to generate code interpretations such as the April 29, 1971 letter. The Court of Appeals affirmed the liability verdict on that ground.

Nevertheless, expressing sympathy for the ASME's predicament, the Court of Appeals ruled that the ASME should not be responsible for the full damage done to Hydrolevel by the scheme because the ASME was, in the Court's view, "far [less] culpable" than M&M or Hartford.[19] Without citing any authority and never mentioning the strict requirements for "withdrawal" from a conspiracy, the Court fashioned a rule that a conspirator's participation in a conspiracy could be "retracted" so as to terminate any further responsibility for continuing damage resulting from the conspiracy. The Court considered the June 9, 1972 ASME letter to Hydrolevel to be such a "retraction," despite the fact that it "confirmed the intent" of the letter supposedly "retracted," despite the fact that the ASME never pleaded or argued a "retraction" theory, and despite the fact that the jury's damage verdict, just as its liability verdict, had as its legal predicate the ASME's own proposed charge (which did not so much as mention "retraction"). App. 1674-87, 1734-35. On this basis the jury's damage verdict was reversed by the Court of Appeals and a new damage trial was ordered. In closing, the Court of Appeals noted that it felt the ASME's role in the conspiracy was "unintentional," and that on remand the trial court should "restrict" Hydrolevel's expert testimony as to damages (which had not been objected to by the ASME) in order to produce a damage figure that the *Court of Appeals* considered to be "more in keeping with the harm Hydrolevel suffered." A-26.[20]

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[19] The Court of Appeal's opinion was rendered prior to this Court's opinion in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. ____, 68 L.Ed. 2d 500 (1981), which expressly confirmed the traditional rule that antitrust conspirators are jointly and severally liable for all of the reasonably forseeable damage resulting from a conspiracy to restrain trade and that there is no right of contribution from joint antitrust tort-feasors.

[20] The Court of Appeals reversed Judge Weinstein's denial of attorneys' fees, as well as the deduction of the settlement amounts prior to trebling, and the ASME did not seek *certiorari* on these points.

Both Hydrolevel and the ASME petitioned this Court for writs of certiorari. The ASME's petition, raising the liability issue discussed herein, was granted on June 15, 1981. Hydrolevel's petition, No. 80-1771, concerning the Court of Appeals' ruling that the June 9, 1972 letter "retracted" the ASME's participation in the conspiracy and the substitution of the Court's own view of "the harm Hydrolevel suffered" for that of the jury, has not yet been acted upon.

SUMMARY OF ARGUMENT

Throughout this appeal, the ASME has pressed two conflicting theses. On the one hand, as it did at trial, the ASME claims that the conduct of Hardin, James and Hoyt in drafting and issuing the April 29, 1971 interpretive letter was "regular," "routine," "according to standard ASME procedures" and a necessary function of the ASME's "code-developing" activities. Moreover, the ASME has repeatedly characterized that letter as "a perfectly sensible reading" and a "straight-forward interpretation" of the Code that was "misinterpreted" and "misused" by M&M. On the other hand, recognizing the validity of the jury's verdict that there was in fact a conspiracy to use the ASME's power over the industry to destroy Hydrolevel, it labels Hardin and James (conveniently ignoring Hoyt) as "dishonest" "volunteers" who were "secretly" acting solely for M&M in "concocting," "manipulating" and "distorting" the ASME Code to further their own monopolistic objectives. The ASME cannot have it both ways. By taking the position that the April 29, 1971 letter was issued by the ASME in the normal course of its standard-setting activities, the ASME has provided important support for the jury's verdict that "the ASME" was responsible for the injury to Hydrolevel.

The ASME relentlessly exploits one word from the opinion of the Court of Appeals to create the diversionary argument that one cannot be an "unintentional" conspirator and that the ASME was improperly found to be a participant in the conspiracy "on a theory of negligence." This straw man is then repeatedly demolished. The fact remains, however, that on a

substantial record, and pursuant to a charge that the ASME declared to be "satisfactory," the jury found that the ASME's agents had the very knowledge and intent which the ASME now claims to have been lacking. The "negligence" argument is simply an attempt to blur the distinction between the elements required for a combination or conspiracy in restraint of trade, which require "knowing" participation by a human being, and the elements needed to hold the human being's corporate principal responsible for that participation, a totally different concept which has never required that the principal expressly or knowingly authorized the unlawful act.

The ASME's liability for the damage caused to Hydrolevel can be justified under any one of several traditional agency law principles. First, because the critical April 29, 1971 letter was a product of the authorized code-development activity of Hardin, James and Hoyt, and was not necessarily adverse to the interests of the ASME, the conduct in question was within the scope of the actual authority of these men and the ASME is liable on traditional grounds of *respondeat superior*. This case bears no similarity to the cases cited by the ASME where the agent is stealing from, or defrauding, the corporate principal and where the courts have therefore refused to impute the dishonest agent's specific criminal intent to the victimized corporate principal. The ASME obtained considerable financial benefit from the code-developing work of its agents and the issuance of the April 29, 1971 letter was not inconsistent with that interest. Second, the ASME's internal conduct and public posturing after learning of the April 29, 1971 letter and its devastating effect upon Hydrolevel constituted a ratification and an affirmance of the letter and the combination that created it. The June 9, 1972 letter to Hydrolevel, far from being a "retraction" of the first letter, expressly "confirmed" it. Third, as the Court of Appeals correctly found, the traditional rules of agency bind a principal to the acts of another, even in the absence of actual authority or ratification, where the principal has led a third party to believe that an apparent agent had the authority to speak or act on the principal's behalf and that third party relied upon the agent's apparent authority. All of these circumstances are admittedly present in this case.

It is not unfair to apply each of these traditional principles of agency law to the ASME in this case; to do so is consistent with every prior decision of this Court involving the vicarious liability of corporate principals for the torts of their agents and there is no reason why a different set of rules should apply to antitrust conspiracy cases. Indeed, as pointed out by the Court of Appeals, it is essential that organizations such as the ASME, which have assumed the unsupervised power to regulate an important part of this nation's economy through the setting of industrial standards, be held responsible under the antitrust laws for the operation of those programs. The ASME has an inherent duty that those programs operate fairly and objectively, a duty the ASME has ignored in practice just as it is ignored in its Brief. By the ASME's own definition, nothing done in the name of a non-profit organization is ever "intended to benefit" that organization and the adoption of the rule proposed by the ASME would, in effect, insulate all such organizations from antitrust liability for the acts of its agents. The law of agency is grounded upon the concept that the principal must be held responsible for the acts of his agents or there will be no incentive for principals to select and supervise their agents with care. If that concept is important in everyday commercial dealings between citizens, it is much more important where the public's interest in a free economy is at stake.

ARGUMENT

I. INTRODUCTION

The ASME asks this Court to declare that non-profit corporations are not responsible under the doctrine of *respondeat superior* for the anticompetitive acts of their agents unless those acts are specifically intended to confer some "benefit" upon the corporate principal. This is, of course, precisely the instruction given to the jury at the request of the ASME. Although the Court of Appeals found that instruction to be "more favorable" to the ASME "than the law required," the

jury found against the ASME under the very legal principle that the ASME is now asking this Court to establish. Whether the Court of Appeals was correct in applying the "less favorable" standard of *respondeat superior, i.e.*, the doctrine of "apparent authority," to this case becomes an issue only if it is concluded that the factual record before the jury could not support the verdict against the ASME on the basis of the charge given, a charge that the ASME both requested and declared "satisfactory" after it was delivered.[21]

It is well settled that jury verdicts based upon proper instructions are not to be disturbed unless "without support in the evidence." *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944). "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Id.* at 35. To do so would deprive the parties of the right to trial by jury. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 358-59 (1962).

Moreover, the jury in this case, as in other cases, was entitled to view the evidence of the ASME's conduct *as a whole*, from March of 1971 through the trial, in order to draw the necessary inferences with respect to unlawful purpose, anticompetitive effect, scope of authority (including "intent to benefit") and ratification. The defendant's conduct cannot be "compartmentalized" or "dismembered" and then scrutinized on a piecemeal basis, as the ASME Brief now urges by examining each of the events from March of 1971 until June of 1972 separately for indicia of "ASME intent" and then wiping the slate clean. *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699 (1962); *United States v. Patten*, 226 U.S. 525, 544 (1913). It is indicative of the ASME's improper approach that its Brief to this Court fails even to mention the

[21] The ASME cannot challenge the instructions of the district court on this appeal for two reasons. First, the ASME did not object to those instructions. Fed. R. Civ. P. 51. Second, if the district court's charge (including the charge on "apparent authority") was indeed in error, we submit that it was an "invited error" which cannot now be attacked. *Maxwell Land Grant Co. v. Dawson*, 151 U.S. 586, 606 (1894); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2558 at 675 (1971).

evidence in the record as to the events which followed the June 9, 1972 ASME letter to Hydrolevel. The ASME did not object to this evidence at trial and the district court found it particularly persuasive on the issue of ratification. App. 756-61; J.A. 34-35, 39-40.

Viewed as a continuum of behavior, even if contrary inferences might reasonably have been drawn, the record overwhelmingly supports the jury's verdict that each individual element of the district court's instruction on liability was satisfied and that "the ASME," through its agents, knowingly engaged in a combination or conspiracy to restrain and to monopolize trade. As Judge Weinstein observed, this was a "nicely balanced jury case" (App. 996) and the verdict of the jury on liability or on damages should not be overturned unless there is no support in the record for that verdict.

II. THE ASME WAS PROPERLY FOUND LIABLE UNDER THE SHERMAN ACT FOR THE ANTICOMPETITIVE CONDUCT OF ITS AGENTS

Although the ASME Brief repeatedly seeks to belittle the conspiracy that is at the heart of this case ("this curious conspiracy," ASME Br. 21), it never directly questions the appropriateness of the jury's verdict: a combination for the purpose of issuing an ASME letter capable of foreclosing Hydrolevel from the market did exist and such a letter was actually issued with the intended effect. The ASME also does not dispute that such a concerted market foreclosure violates both Sections 1 and 2 of the Sherman Act, but suggests that it is unprecedented to find unlawful a conspiracy that does not have as an objective a positive economic "benefit" for all of the participants. This suggestion simply ignores the entire history of the antitrust laws.

This Court has expressly held that it is not necessary that an agreement be intended to "benefit" all of the participants before it may be considered to be a combination in violation of the Sherman Act. *Albrecht v. The Herald Co.*, 390 U.S. 145, 152 n.8 (1968). As that case demonstrates, a conspiracy in restraint of trade may actually operate to the financial *disadvantage* of one or more members of a conspiracy without

exempting those members from the full legal consequences of their acts. A combination or conspiracy which violates the Sherman Act may not even be the result of a strictly economic decision at all, but may be motivated by a genuine concern to prevent unfair trade practices, *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457 (1941), or a desire to promote public safety and protect professional ethical standards, *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), or simply the result of a personal feud. *Klor's Inc. v. Broadway-Hale Stores Inc.*, 359 U.S. 207, 210 (1959). If it has the forbidden effect it is unlawful nevertheless.

"[A]ny concerted action . . . to cause, or which in fact does cause, . . . restraint of competition . . . is unlawful." *American Column & Lumber Co. v. United States*, 257 U.S. 377, 400 (1921). The general rule is that proof of *either* an unlawful purpose *or* an anticompetitive effect subjects all of the participants in a concerted action to civil antitrust liability. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13, 446 n.22 (1978). In this case both unlawful purpose and anticompetitive effect are clearly demonstrated. Moreover, the participants are "held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary." *United States v. Patten*, 226 U.S. at 543.

Seizing upon the passing remark of the Court of Appeals that "the ASME" was an "unintentional participant" in the scheme, the ASME has constructed an elaborate diversionary argument: *viz.*, that because one cannot be an "unwitting" conspirator, the ASME has actually been exonerated and the complaint should be dismissed. This argument, of course, assumes the very conclusion that is being urged upon this Court, *i.e.*, that the ASME should not be held responsible for the acts (and therefore the presumed intent) of its agents and ignores the obvious fact that corporations, unlike human principals, can harbor no intent and can perform no acts, *except* through their agents. It is meaningless to speak of the "intent" or "knowledge" of "the ASME," or the lack thereof, as being divorced from the "intent" and "knowledge" of the very agents

expressly delegated to do its most important and most remunerative work, the development and interpretation of its codes.

The "unintentional participant" remark of the Court of Appeals panel is inconsistent with the entire body of agency law that holds a principal liable for acts of his agents, even when those acts were directly contrary to the principal's instructions (and thus were "unintentional" as far as the principal was concerned). Moreover, the "unintentional participant" comment, from which the ASME draws so much comfort, ignores the charge of the district court and the verdict of the jury rendered pursuant to that charge. Judge Weinstein repeatedly instructed the jury that there had to be a "knowing" and "intentional" commitment to a common end, that there could be no such thing as an "unwitting" conspirator, and that "indifference," "recklessness," "gross negligence" or "stupidity" could not be "a substitute for willful joining of the conspiracy." J.A. 45-46, 52. The jury found that "the ASME" was such a conspirator, *based upon the acts of its agents.*

Thus, the ASME's claim that it was found liable by the Court of Appeals on a "theory of negligence" deliberately obscures the distinction between an issue conceded by the ASME and not before this Court (whether Hardin, James and Hoyt joined in a combination in restraint of trade, which the jury clearly found to have been "willful," "knowing" and not "negligent") and the separate issue of whether the ASME, as a corporate principal, should bear the responsibility for those acts. It is only the second issue that concerns us here and the result does not turn on "willfulness." Rather, it involves a traditional examination of the relationships among the principal, the purported agents (and the nature of their acts), the victim and the public.

It has long been recognized that the imputation of an agent's conduct and knowledge to the principal is a fiction, a fiction that is compounded when the principal is a corporation

that cannot act or think other than through its agents.[22] In such circumstances, fundamental fairness requires that the principal, who expands his power and ability to act by utilizing the services of others, accept responsibility for his agent's improper conduct just as he accepts the benefit of the agent's proper conduct. *Gilmore v. Constitution Life Insurance Co.*, 502 F.2d 1344, 1348 (10th Cir. 1974).

The agency rules governing the imputation of the conduct and the knowledge of an agent to his principal are well-established. A principal is liable to an injured third person for the acts of an agent if the agent was (a) authorized, (b) apparently authorized, or (c) had an inherent power to bind the principal arising from the agency relationship. *Restatement (Second) of Agency* § 140 (1959)(hereinafter "*Restatement*"). The liability of the principal may be based upon two, or even all three, of these grounds. *Restatement* § 140, Comment *a.* Under a fourth ground, a principal may be held liable for conduct that was unauthorized if he ratifies or affirms that conduct after notice. *Restatement* § 82-99, 143. It is important to note that *only* the first of these four grounds for a principal's liability involves a consideration of whether the agent intended to serve his principal's interests in performing the acts in question. In this case, the record supports a finding of liability against the ASME under *all four* of the grounds set forth above.

A. The Conduct of Hardin, James and Hoyt Was Within The Scope Of Their Actual Authority

When an agent or employee is engaged in activity which has been delegated to him by his principal, even though his primary purpose is to benefit himself or another by that activity, the principal has traditionally been held responsible for the consequences because such activity is performed "within the

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[22] "Endowing a corporation with a fictitious 'personality,' so that, for example, it has 'knowledge,' is a useful device for the analysis of many problems. But it can also constitute a trap for the unwary when they ascribe reality to the fictions." *Schoenbaum v. Firstbrook*, 405 F.2d 200, 215 (2d Cir. 1968)(Hays, J. concurring in part and dissenting in part), *rev'd en banc*, 405 F.2d 215 (2d Cir.)(Opinion by Hays, J.), *cert. denied*, 395 U.S. 906 (1969).

scope" of the agent's delegated authority. *Restatement* § 236. As long as the activity of the agent was of the general type as his authorized activity or "sufficiently similar" to authorized activity, and was performed *at least in part* on behalf of the principal, the principal is liable even when the agent's specific acts were directly contrary to the principal's express instructions, and even when those acts were criminal in nature. *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909); *Lewis v. Walston & Co., Inc.*, 487 F.2d 617 (5th Cir. 1973).

In cases where only the agent's *conduct* is in question (because the general intent to achieve the results of that conduct is presumed), the analysis is relatively uncomplicated. The finder of fact evaluates the evidence and determines whether the conduct was actuated "to any appreciable extent" by a purpose to serve the master or principal. If so, the conduct is considered to be within the scope of the agent's or servant's authorized activity. *Restatement* §§ 228-236. *See also* Comment *b* to § 236. According to these well-established rules, an agent or servant may indeed "serve two masters" and can bind *both* masters or principals by his conduct, as long as both are "interested in the performance of the same act" and the conduct is not necessarily adverse to the interests of either. *Restatement* §§ 226, 235 and 236.[23]

However, where the "intent" or "knowledge" of the principal is a separate and distinct element of the principal's liability, as in criminal cases where specific intent is required, courts have been careful not to impute such intent to a principal simply because the physical conduct of the agent may have been within the scope of the agent's authorized duties. In such cases, the knowledge or intent of the agent must not have been "adverse" to the principal's interests for it to be imputed to the

[23] It ill becomes the ASME piously to incant the biblical "adage" about man's inability to serve both God (presumably the ASME) and Mammon (presumably M&M)(ASME Br. 34), when the ASME had, for 23 years, demanded just such service from John James.

principal. Section 282 of the *Restatement* sets out the rule as follows:

> A principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purpose, except . . . if the failure of the agent . . . to reveal the information results in a violation of a . . . relational duty of the principal to a person harmed thereby. . . .

In order to bring itself within this rule, as it apparently seeks to do, the ASME must establish both that the issuance of the April 29, 1971 letter was an act "adverse" to the interests of the ASME, *and* that the ASME had no "relational duty" to Hydrolevel. The ASME cannot satisfy either of these propositions and, significantly, neither proposition was the subject of any proof, or even argument, by the ASME at trial.

All of the cases cited by the ASME in its attempt to establish that an "intent to benefit" the principal is a required element of a principal's liability are nothing more than applications of the rule set forth in § 282. For example, in *Standard Oil Co. v. United States,* 307 F.2d 120 (5th Cir. 1962), a case heavily relied upon by the ASME, the issue was whether the specific criminal intent of certain employees could be imputed to the corporate employer in order to find the employer guilty of a "knowing" violation of the law. Employees of the defendant corporations participated in a scheme to steal oil from their employers and to falsify the necessary records in order to assist a third party's criminal enterprise. One of the corporate employers reported the matter to the authorities immediately after learning of the scheme (an attitude that is to be contrasted with that of the ASME in this case) and one can only imagine the companies' consternation when the government filed criminal charges against the *corporations* for "knowingly" violating a federal law forbidding interstate transportation of "hot" oil. Not surprisingly, the Court of Appeals found that stealing from one's employer is "adverse" to the employer's interests and therefore refused to impute the employees' specific criminal intent to the corporate defendants

despite the fact that the employees' physical activity in carrying out the theft was encompassed within their "regular functions."[24]

We see nothing in the *Standard Oil* opinion which helps the ASME in this case. It is one thing to refuse to impute the criminal's specific intent to the victim, just because of an agency relationship, and quite another to refuse to hold the corporate employer responsible to an injured or defrauded third party for the unlawful acts of his agents when those acts are part of the regular, normal "functions" of the agent. Moreover, when the corporate principal owed an obligation or duty to the injured third party which was violated by that conduct, the principal cannot avoid liability even when the agent was secretly acting solely for his own purposes. *See Restatement* § 282.

Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), and the quotation from the panel majority opinion at page 26 of the ASME's Brief, is consistent with this rule, even though that opinion was *reversed* by the Second Circuit Court of Appeals sitting *en banc*, *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir.), *cert. denied*, 395 U.S. 906 (1969), which the

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[24] To the same effect is *United States v. Ridglea State Bank*, 357 F.2d 495, 499 (5th Cir. 1966), discussed at length in the ASME's Brief at pp. 31-33. None of the cases cited in the footnote on page 26 of the ASME Brief stand for the proposition for which they are cited, *i.e.*, that an agent acting solely for himself can never bind a principal, and some are authority for the contrary rule. For example, the ASME quotes the following portion of a sentence from *Moscarelli v. Stamm*, 288 F. Supp. 453, 461 (E.D.N.Y. 1968): "It is axiomatic that conduct of an employee not for the purpose of serving the master is not within the scope of his employment (Restatement (Second), Agency, § 235 (1958). . . .)" What has been surgically ellipsized, however, expressly accepts apparent authority as a basis for liability under *Restatement* § 219(2)(d), which provides for liability to attach to the principal where the agent acts *"solely"* for his own purposes. *See* Comment *e* to § 219. We would argue that the *Moscarelli* opinion actually rejects the fundamental point being argued by the ASME in this appeal.

The ASME's citation of *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979) is even more puzzling. There the corporate principal was convicted of a "willful" violation of a criminal statute over an argument that the agent had no "intent to benefit" the principal and where the charge given to the jury by the trial court was indistinguishable from that given in the instant case at the ASME's request. The conviction in *Beusch* was affirmed.

ASME Brief fails to note. That case involved allegations that corporate directors conspired to sell treasury stock for a price far below its true value. The Court, sitting *en banc*, refused to impute the directors' knowledge to the corporation, a result entirely consistent with *Restatement* § 282 and the *Standard Oil* case. There was far less, if any, "conflict" between the interests of the ASME and those of Hardin, James and Hoyt in issuing the April 29, 1971 letter than there is between a corporation and the directors who are giving away its stock, and we submit that the *Schoenbaum* case, and the general rule quoted from it by the ASME, supports Hydrolevel's position in this case.[25]

The ASME fails to explain how the facts of this case fit within that general rule. How does the ASME claim that the issuance of the April 29, 1971 letter, or even the interests of Hardin, James and Hoyt in issuing it, were "adverse" to its own interests? Apparently the letter was "adverse" to the ASME's interests only because this litigation ensued, surely not the type of adversity that would permit a principal to escape liability.[26]

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[25] The other cases cited at pages 24-25 of the ASME Brief are merely applications of the general agency rule that even the acts of "disloyal," "dishonest" or "disobedient" agents are imputed to the principal where the agents intended their unlawful acts to profit their corporate employers. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978). These unremarkable decisions do not stand for the *reverse* of that proposition, however, as the ASME implies, *viz*, that where there is no such intent there can be no corporate liability. "[B]enefit, at best, is an evidential, not an operative, fact." *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945). Where the illegal activities "were carried on as an incident to the carrying on of the corporation's business and were made possible only through the corporate authority with which [the agent] was clothed . . .," a corporate defendant may be found to be criminally liable for the agent's conduct. *United States v. Empire Packing Co.*, 174 F.2d 16, 20 (7th Cir.), *cert. denied*, 337 U.S. 959 (1949). The conduct of Hardin, James and Hoyt fits precisely within this language.

[26] "Presumably no tortious act by an agent redounds to the benefit of the principal where the latter is held responsible for the damage which results." *J.C.B. Super Markets, Inc. v. United States*, 530 F.2d 1119, 1122 (2d Cir. 1976).

It is possible the jury was convinced that Hardin and Hoyt were motivated solely by a desire to help John James, an old friend and longtime ASME colleague who had devoted many years of "free" service to the ASME. As we shall develop in Part III A, *infra*, such a motive would be fully consistent with the ASME's traditional interests. It is also possible that the jury felt that Hardin and Hoyt believed that the ASME's interests lay in keeping the new and unproven Hydrolevel probe off the market and in preserving the market for products that operate on the well-known "float" principle. The ASME has simply pointed to no fact in the record consistent with its often repeated claim that the issuance of the April 29, 1971 letter and its subsequent use was adverse to the interests of the ASME.

Even assuming that the issuance of the letter by Hardin and Hoyt was intended solely to help M&M protect its monopoly and was arguably adverse to some interest of the ASME, the ASME would still have to show that the conduct of Hardin and Hoyt did not violate any duty which the ASME had to Hydrolevel in order to come within the terms of the exculpatory principle set forth in § 282 of the *Restatement*. As we explain more fully below, the ASME unquestionably had a duty to the industry which it had appointed itself to regulate, and to Hydrolevel as a part of that industry. This is a subject that is understandably ignored throughout the ASME Brief.

In this case, there is abundant evidence that the acts of Hardin, James and Hoyt were authorized or sufficiently similar to authorized acts that they could reasonably be considered by the jury to have been performed on behalf of the ASME. First, there are formal (and we submit conclusive) admissions of that fact by the ASME. The ASME's Answer to the Amended Complaint expressly admits that "[i]n its letter dated April 29, 1971 . . . *ASME responded* to an inquiry from one of its members . . . ." J.A. 30 (emphasis added). The ASME Answer continues that "[t]he statements contained in the letter of April 29, 1971 . . . *were made by ASME . . . in furtherance of ASME's legitimate interests in the promulgation of safety standards for boilers.*" J.A. 31 (emphasis added). Second, the evidence was undisputed that Hardin and Hoyt had express written authority from the ASME to draft and issue interpretive letters like the

April 29, 1971 letter. (J.A. 120; AX V. 174, 179-81). Third, the ASME's trial counsel repeatedly told the jury that the April 29, 1971 letter was issued *by the ASME* and pursuant to the ASME's efforts to "serve the public." App. 149-50, 1096, 1103-04, 1109, 1114. Judicial admissions, including admissions of counsel during trial, are, of course, binding, even on appeal. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972); *State Farm Mutual Automobile Insurance Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968).

Finally, the evidence relating to the ASME's subsequent behavior also overwhelmingly supports the conclusion that the April 29, 1971 letter was written and issued "on behalf of" the ASME. The entire series of events surrounding the June 9, 1972 letter justified a finding by the jury that, at the time the first letter was issued, it was on behalf of and for the benefit of the ASME and pursuant to its standard procedures. Indeed, the 1974 resolution of the Professional Practice Committee expressly stated that Hardin, James and Hoyt were acting "in the line of duty" by issuing the first letter and self-righteously took the *Wall Street Journal* to task for having the temerity to imply the contrary. *Even ASME's Brief in this Court* repeats the admission that the April 29 letter was "routinely" issued by the ASME in accordance with its "standard procedures" (ASME Br. 8) and that it was an "accurate response to the question presented." ASME Br. 37 n.*.

In the face of this record the ASME should not now be permitted to dispute that the April 29, 1971 letter was prepared and issued on behalf of and for the benefit of the ASME. This is not a case where a defendant forthrightly denies from the outset that a purported agent was acting on its behalf with respect to the injurious act. We have here a defendant that throughout this litigation has sought to vindicate its agents, as well as itself, by taking inconsistent factual positions: *viz.*, by arguing on the one hand that the acts in question were authorized (because they were innocent) and on the other hand that they were not authorized (because they were not innocent). A litigant which asserts such contradictory positions cannot be heard to complain if the jury selects only half of each

factual proposition and concludes that the acts were authorized (and were not innocent).[27]

B. The ASME Ratified And Affirmed The Anticompetitive Conduct

Assuming, *arguendo*, that Hardin, James and Hoyt had not acted within the scope of their authorized ASME duties in issuing the April 29, 1971 letter, the ASME nevertheless clearly ratified and adopted it as its own. The district court expressly instructed that, in considering whether the ASME ratified or adopted the acts of Hardin, James and Hoyt, the jury could take into account the ASME's "action or failure to act, when the actions of the individual staff or committee members came to wider attention within the defendant." J.A. 52. Judge Weinstein felt that the evidence of ratification was particularly strong. App. 593-594.

Under well-accepted principles, ratification may be manifested in many ways, *e.g.*, by a verbal statement, a writing, "or by doing nothing after learning of the unauthorized act." W. Seavey, *Handbook of the Law of Agency* § 37 at p. 67 (1964) (hereinafter "Seavy, *Agency*").

> [Proof of ratification] may consist merely of inaction. This is sufficient to indicate affirmance if, after learning that an unauthorized act was done on his account, the purported principal gave no indication of protest or disagreement, as a normal person in his position would have done. This failure to take action is evidence of a willingness to become a party to the transaction.

Id. (footnote omitted). Whether the ASME, by its acts or failure to act after notice, endorsed or adopted the April 29, 1971 letter was properly a jury question. It is instructive that

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[27] We respectfully suggest that the doctrine of judicial estoppel is appropriate in this case. "A party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits." II *Freeman on Judgments* § 631 (5th ed. 1925), as quoted in *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate." *Id.*

the ASME Brief devotes only four sentences to this issue and relies exclusively upon the "finding" of the Court of Appeals that the June 9, 1972 letter was a "retraction" of the earlier letter to support its argument. ASME Br. 42.

In addition to the evidence described above, relating to the ASME's formal admissions and presentations of evidence at trial (all of which would support a ratification theory as well as an actual authority theory), the ASME's entire course of conduct, after Mr. Rymer's March 23, 1972 letter gave it notice of the damage being done to Hydrolevel (ASME Br. 9-10), strongly supports a finding of ratification. The June 9, 1972 letter itself, which the Court of Appeals denominated a "retraction" in order to allow the ASME to escape having to pay for the damage caused to Hydrolevel, was, in fact, exactly the opposite. It was vague and ambiguous, "confirmed the intent" of the *entire* earlier letter and closed with cautionary language written by James as a "limitation" on the acceptability of time-delays under the Code. In Judge Weinstein's words, it was "not a forthright . . . letter correcting [the] previous letter that was now being circulated by a competitor." J.A. 40. Indeed, how can anyone argue that the April 29, 1971 letter was "retracted" when the ASME is still representing that it was "accurate"? ASME Br. 37 n.*.

The ASME's continuing refusal to initiate a meaningful internal investigation of the actions of Hardin, James and Hoyt, or to discipline them, and the incredibly arrogant resolution of the Professional Practice Committee *commending* their actions as being "in the line of duty" further supports a finding that the ASME ratified the conduct in question.

> The retention in employment of a servant who has committed a tort not in the scope of employment is frequently urged as a ratification of the tortious conduct and a number of courts have held that this fact alone is prima facie an affirmance. Other courts require corroborative evidence. *If there is active assistance to the cause of the employee or commendation of his conduct, all courts find affirmance.*

Seavy, *Agency* § 37 at p. 69 (footnotes omitted)(emphasis added).

C. The ASME Is Responsible for the Acts of Its Agents Performed within Their Apparent Authority

The Court of Appeals found it unnecessary to examine the record support for the verdict of the jury under the "actual authority" or "ratification" instructions because it found that the ASME's liability was clearly established under the less stringent concept of "apparent authority." As is pointed out in Comment *f* to § 8 of the *Restatement*, "the term 'apparent authority' has been broadly used by the courts to describe the power which agents have in creating liability against their principals, although without authority." According to the *Restatement*, true "apparent authority" is found only where a manifestation by the principal to a third party has caused that third party reasonably to believe that the apparent agent has the power to act on behalf of the principal, and the third party relies upon that manifestation. It differs from the creation of actual authority, which is based upon a delegation or grant to the agent himself, and is simply a different formulation of the same "business equity" that is the basis for agency law in general. *See Restatement* § 8, Comments *a, b, c, f.*[28]

As pointed out by the Court of Appeals, the ASME gave these men control of the code-developing machinery needed to accomplish their anticompetitive purposes and held them out to the world as being able to speak authoritatively on behalf of the ASME in such matters. By issuing interpretations of the ASME Code according to standard ASME procedures on ASME letterhead and over the signature of a full-time ASME staff officer, they bound the ASME regardless of their true purposes

[28] A similar concept is "inherent agency power," which is based solely upon the relationship between the principal and the agent without the need for any manifestations to a third party. *Restatement* § 8 A. Inherent agency power results in the principal's liability when the "agent acts purely for his own purposes in entering into a transaction which would be authorized if actuated by a proper motive." *Restatement* § 8 A, Comment *b. See also Restatement* §§ 165, 262. The "inherent agency power" basis for liability is even more appropriately applied to this case than the concept of "apparent authority," and, as indicated by the *Restatement*, both may be found in the same fact situation.

or underlying motives. This is the clear impact of the principles described by §§ 219, 247-49, 257-65 of the *Restatement.*[29]

Relying almost exclusively on a passage found in this Court's opinion in *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922), the ASME asserts that the doctrine of "apparent authority" has been "expressly rejected . . . as a basis for holding a voluntary organization liable under the antitrust laws for an agent's acts." ASME Br. 17-18. To the contrary, that opinion never addressed the question which the ASME now grandly claims it "expressly rejected." In *Coronado* this Court reviewed an antitrust judgment against the United Mine Workers of America for a strike by one of its local unions. The plaintiff argued that the international union had given the local union actual authority for the strike, or had ratified it, thus assuming responsibility. On the basis of the international union's constitution and other facts in that case, this Court found that no actual authority or ratification existed. The Court expressly noted that the case did *not* involve the "holding out [of] an appearance of authority on which some third person acts," 259 U.S. at 395, and then found the international union not liable for the local strike. By going out of its way to assert the *absence* of apparent authority, the Court clearly implied

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[29] The fact that those who relied on the "appearance" of agency were not those who were injured, as argued in the ASME Brief, is clearly irrelevant. *See Restatement* § 265, Comment *a.* As both § 8 and § 265 and the comments to these sections make clear, as long as *someone* relied on the manifestation of "apparent authority," the principal is bound. Not one of the cases or provisions cited by the ASME supports the statement in the ASME Brief (at p. 29) that "[a] crucial element has been that *plaintiff himself relied* upon the manifestation of authority given by the defendant" (emphasis added). The quotation from Seavey, *Agency* at p. 29 of the ASME Brief is particularly abused and confuses the concept of apparent authority with that of estoppel. Seavey *never said* that "apparent authority as a basis for liability is available 'only to those by whom the misleading manifestations [of authority] are received.'" ASME Br. at 29, purporting to paraphase Seavey, *Agency* § 8, at p. 14. Indeed, on the page before that cited, Seavey indicates that as long as the manifestation "led others, including the plaintiff, to believe that the agent had the authority . . .," the doctrine is applicable. § 8, at p. 13. The reliance of those "others," the potential customers for Hydrolevel's product, on Hoyt's authority to issue interpretative letters is precisely what destroyed Hydrolevel and prompted this lawsuit.

that the result would have been different had it been present. This analysis of *Coronado* is confirmed by the decision of a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit in *Mile Branch Coal Co. v. United Mine Workers of America*, 266 F.2d 919, 922 (D.C. Cir. 1959). For the ASME to claim that the *Coronado* case "expressly rejected" the use of an "apparent authority" doctrine in antitrust cases is plainly unfounded.[30]

Contrary to the ASME's contention, there is nothing to indicate that the entire range of agency law principles, including those of "apparent authority" and "inherent agency power," do not apply in all substantive legal fields. In *Gleason v. Seaboard Air Line Railway Co.*, 278 U.S. 349 (1929), the principal case relied on by the Court of Appeals below, this Court adopted the concept of apparent authority as a basis for the liability of a principal in the federal courts, expressly overruling a previous decision that had held to the contrary, *viz., Friedlander v. Texas & Pacific Railway Co.*, 130 U.S. 416 (1889). "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Gleason v. Seaboard Air Line Railway Co.*, 278 U.S. at 356. That has been the law in the federal courts ever since. *See Ricketts v. Pennsylvania Railroad Co.*, 153 F.2d 757, 759 (2d Cir. 1946)(Opinion of Learned Hand, J.).

Gleason has been followed by many other federal court decisions applying the "apparent authority" concept to find principals liable in a wide variety of federal regulatory and common law causes of action. Nowhere in those cases, or in any of the cases cited by the ASME (with the exception of the dictum in *Truck Drivers, supra* n.30) is there any indication that the entire body of agency law, including "apparent authority,"

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[30] The only case cited by the ASME containing any language that would support the ASME's strained reading of *Coronado* is *Truck Drivers' Local No. 421 v. United States*, 128 F.2d 227, 235 (8th Cir. 1942). Like *Coronado*, that case involved only allegations of actual authority and ratification. It did not directly address the issue for which the ASME cites it, although in one passage of dictum the Court does read *Coronado* in the same manner the ASME is now urging on this Court.

is not applicable to antitrust cases or to any other specific type of tort or other violation of a legal obligation.[31]

In *S.E.C. v. First Securities Co.*, 463 F.2d 981, 985 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972), the Court applied §§ 261 and 262 of the *Restatement* to hold a corporate principal liable under the federal securities laws for a "secret" fraudulent scheme perpetrated by an apparent agent of the corporation purely for his own benefit. The same result, based on the same reasoning, is found in *Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731, 741 (10th Cir. 1974), and *Henderson v. Croom*, 403 F. Supp. 668 (N.D. Ala. 1975), also federal securities law cases. *Sennott v. Rodman & Renshaw*, 474 F.2d 32 (7th Cir.), *cert. denied*, 414 U.S. 926 (1973), a securities case relied upon by the ASME for its "reliance" argument (*see* footnote 29 *supra*) is interesting for several reasons. First, even though the principal in that case was found not to be liable (on the ground that *nobody* relied upon the apparent authority of the agent to act for the principal), the case clearly applied the apparent authority doctrine and simply found that the necessary facts were not present. This surely does not support the expansive

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[31] *Dark v. United States*, 641 F.2d 805, 808 (9th Cir. 1981); *In re F. W. Koenecke & Sons, Inc.*, 605 F.2d 310, 312-13 (7th Cir. 1979); *National Acceptance Co. of America, v. Coal Producers Ass'n Inc.*, 604 F.2d 540 (7th Cir. 1979); *United States v. Sanchez*, 521 F.2d 244, 246 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *Gilmore v. Constitution Life Ins. Co., supra; Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 140, 143 (10th Cir. 1966); *Employers' Liab. Assurance Corp. v. L. J. Marcotte Ins. Agency*, 314 F.2d 470, 476-78 (8th Cir. 1963); *Bowman v. Home Life Ins. Co. of America*, 243 F.2d 331, 335 (3rd Cir. 1957); *Izard v. Arndt*, 483 F. Supp. 261, 263 (E.D. Wis. 1980); *Ira S. Bushey & Sons, Inc. v. United States*, 276 F. Supp. 518, 527-30 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 167 (2d Cir. 1968). When Congress discerned a need to create a separate standard for secondary liability in connection with a federal cause of action it has not hesitated to do so. Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), sets forth such a standard of liability for "controlling persons" under that Act and whether the common law of *respondeat superior* is still applicable in cases brought under that Act is an open question in this Court. *See Sharp v. Coopers & Lybrand*, ____F.2d____, [1981] Fed. Sec. L. Rep. (CCH) ¶97,971 (3d Cir. 1981), *petition for cert. filed* (Sept. 2, 1981); *Marbury Management, Inc. v. Kohn*, 629 F.2d 705 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3409 (1980). Because of this dual standard of secondary liability the federal securities cases on this issue must be read with care.

claim of the ASME that liability based upon "apparent authority" is unavailable in the federal courts. Second, the case is interesting because in their dissent from this Court's denial of *certiorari*, two Justices wrote:

> [L]iability cannot be confined to those formally authorized to act in the firm's behalf, for such a rule would constrict the common law principles of apparent authority, a construction inconsistent with the broad remedial purpose of the legislation. The purpose of the [Securities Exchange Act of 1934] is to expand, not restrict, the public's remedies.

Sennott v. Rodman & Renshaw, 414 U.S. 926 (1973) (Justices Douglas and Blackmun dissenting from denial of *certiorari*).

The Sherman Act and the Clayton Act, no less than the Securities Exchange Act of 1934, are remedial in nature and intended to expand, not restrict, the public's remedies. In *Continental Baking Co. v. United States*, 281 F.2d 137, 150-51 (6th Cir. 1960), an "apparent authority" instruction to the jury in a criminal antitrust action was held to be an "appropriate expression in simple terms of a difficult legal concept." The instruction in that case was virtually identical to the charge in the instant case except, of course, that "intent to benefit" was not required. Similarly, in *United States v. Continental Group, Inc.*, 603 F.2d 444, 468 n.5 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), the Third Circuit Court of Appeals approved a criminal antitrust jury instruction on "apparent authority" which also was virtually identical to the charge in the instant case (but again without the requirement of an "intent to benefit"). Trial Tr. at Vol. 35, pp. 11-12, *United States v. Continental Group, Inc.*, Civ. Nos. 76-514, 76-524 (E.D.Pa. 1978).[32] The anticompetitive acts of an apparent agent were sufficient to bind the principal in *Azalea Drive-In Theatre, Inc. v. Sargoy*, 394 F. Supp. 568, 573, 577 (E.D. Va. 1975), *rev'd on other grounds*, 540 F.2d 713 (4th Cir. 1976), and in *Adams-*

[32] Standard jury instructions on "apparent authority" are also carried in the American Bar Association Antitrust Section's twin volumes *Jury Instructions in Criminal Antitrust Cases 1964-1976*, 79-90 (1978) and *Antitrust Civil Jury Instructions (1980)*, 18-21.

Mitchell Co. v. Cambridge Distributing Co., 189 F.2d 913, 917 (2d Cir. 1951), both civil antitrust suits. In a case involving a state treble damage antitrust statute, *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 770 (S.D.N.Y. 1980), defendants were held liable for acts of an apparent agent. The Second Circuit's opinion in the case at bar was cited with approval by the United States Court of Appeals for the District of Columbia Circuit in *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, ___ F.2d ___, [1981-82] Trade Cases (CCH) ¶ 64,217 at p. 73,847 n.13 (D.C. Cir. 1981), another antitrust case. Except for the fact that the ASME is a non-profit corporation, there is nothing to distinguish this case from any of the authorities cited.[33]

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[33] The ASME Brief repeatedly argues that the apparent authority concept has been applied most often in actual damage cases, which is true, and that there is a conceptual barrier to applying it in punitive or treble-damage cases, which is not true. The *Restatement* makes it very clear that punitive damages against a principal are appropriate in many instances, including several that are found in this case (including "apparent authority" situations). *Restatement* § 217 C. As to liability under treble damage statutes, such as the federal antitrust laws, the *Restatement* expressly, and quite appropriately, says that § 217 C is not applicable and it makes "no statement" on the question. § 217 C, Comment *c*. As the cases cited *supra* demonstrate, the federal courts have not hesitated to apply the apparent authority rule in treble damage situations, or even in criminal cases not requiring specific intent. While it is true that in *United States v. Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966), the Fifth Circuit Court of Appeals considered the punitive purpose of the False Claims Act as an additional ground for refusing to impute the specific unlawful intent of a bank officer to the defrauded employer bank, the fact remains that the Government was seeking to impute a specific intent from the wrongdoer to the victim, a situation precisely the same as that found in *Standard Oil, supra*. We have found no case, and none is cited in the ASME's Brief, where a court has refused to hold a principal liable for the *conduct* (and general intent) of an apparent agent where punitive, or statutory double or treble damages were being sought by the injured third party. We note, of course, that the ASME makes no argument that treble damages or even criminal penalties could not be assessed against a principal for acts of agents within their actual authority or where the principal has ratified those acts. Both are present in this case.

It is Congress that fixed the treble damage rule in order to encourage private vigilance over the free competitive marketplace which is the bedrock of this nation's economy. If it provides a "windfall" for plaintiffs such as Hydrolevel, as the ASME suggests at p. 34 of its Brief, it is a "windfall" granted by Congress, and if non-profit corporations are to be exempted from that rule the exemption should also be granted by Congress.

III. AS A MATTER OF POLICY, PRIVATE GROUPS THAT EXERCISE UNREGULATED POWER OVER THE ECONOMIC FREEDOM OF OTHERS SHOULD NOT BE EXEMPTED FROM THE TRADITIONAL RULES OF *RESPONDEAT SUPERIOR* IN ANTITRUST CASES

In Point III of its Brief, the ASME presses two "policy" arguments for the relief it seeks from this Court. First, gloomily predicting that if the ASME and "innumerable" other non-profit organizations with "exemplary records" are held responsible for the anticompetitive acts of their "volunteer" agents, they would have no choice but to abandon their good works. This would create, we are told, a vacuum that the government would have to fill, thus endangering the entire "quality of life in America." Second, the ASME urges that "non-profit" organizations, such as itself, are in a "vulnerable financial position" and therefore the "risk of loss" should be placed solely upon the "disloyal" individual "volunteer" and his profit-making employer, both presumed to be more solvent than the non-profit organization which employed the individual. Viewed against the ASME's own circumstances, neither of these "policy" arguments should persuade this Court to exempt the ASME from the traditional law of *respondeat superior* in antitrust cases.

A. The History of the ASME Demonstrates the Need for the Application of the Traditional Legal Standard of Accountability

The ASME argues that making it accountable for the "disloyal" acts of its agents would punish it for something beyond its power to control and that, in any event, such sanctions are unnecessary because the "instances of abuse, such as in this case, are certainly rare. . . ." ASME Br. 45. Not content with this vague generalization, at p. 45 n.* of its Brief the ASME makes the following representation:

> ASME has been promulgating and maintaining voluntary safety standards for nearly one hundred years without a single prior instance of abuse of its procedures like that present in this case. The innumerable other professional organizations, of which the *amici curiae* referred to below are representative, have maintained similar exemplary records.

Not only are these representations of fact outside the record, they are, regrettably, false. The ASME has been dominated by commercial interests since the day it was organized, although such domination is not always inconsistent with a high regard for safety or with the desirable standardization of product and procedure that is essential for the development of a rational *and* competitive marketplace. Domination by private commerical interests does, however, involve inherent dangers for a free marketplace, where innovation and competition interact and provide the economic and social benefits to the public which are the goals of the Sherman Act. It is not our position that these goals *cannot* be met by a private organization that administers a standard-setting program, but in *this* case the record is clear that the ASME made no effort whatsoever to accommodate the objectives imposed upon them by the antitrust laws.

The ASME's history exemplifies the principle that if individuals having a commercial interest in a market are permitted to regulate that market, they will regulate it for their own benefit and not for the benefit of outsiders.[34] Since its inception the ASME has been run by a small group of businessmen and repeated efforts by the membership to change that attitude have had little positive effect. *See* M. Calvert, *The Mechanical Engineer in America, 1830-1910,* 111, 120-23 (1967).

Last year the ASME celebrated its one-hundredth birthday. To mark the event, the ASME commissioned a book by Bruce Sinclair, *A Centennial History of the American Society of Mechanical Engineers, 1880-1980* (University of Toronto Press, 1980) (hereinafter *"Centennial"*). Because this historical study was copyrighted by and published for the ASME, it constitutes, in effect, the Society's autobiography. *Centennial* chronicles how, in its early years, the ASME had been dominated by a small group of authoritarian New Yorkers, primarily "utility men" (pp. 65-71, 88-98, 100-05, 111, 181-85), and how, when the ASME first moved into the field of standard-setting in the 1880's, it was quickly recognized that the commercial interests of its influential members would affect the way they created and administered those standards. Because the ASME recognized

[34] *Cf. United States v. Topco Assocs., Inc.,* 405 U.S. 596, 611 (1972).

that its standard-setting members would try to advance their individual commercial interests, it tried to "balance" the committees, including the boiler code committee, with "representatives" of both manufacturers and users so that "in their own interest users would prevent the representative producer from measures that might give him an unfair market-place advantage over his own competitors." *Centennial* 55, 213. For this reason, those who worked on the boiler code "watched each other 'pretty closely,' " but "[t]hey also knew that some of the ASME's members often used or tried to use its programs and activities to further the commercial concerns of their employers." *Centennial* 152. When the Boiler Code was first adopted in 1914, the "balance" concept, and the problems inherent in it, remained, and have continued through to the present. App. 617.[35]

An important characteristic of the ASME's boiler code committee has been the stability of its membership. The ASME Council exempted the boiler committee and its subcommittees from the usual rule that members be rotated, with the result that many of its members, like John James, have been virtually permanent fixtures in their "volunteer" committee jobs. For example, from 1914 until 1941, David S. Jacobus was a founder, then Vice-Chairman and finally Chairman of the Main Committee, maintaining "the Babcock and Wilcox 'seat' on the committee, a term its members commonly used to express the fact that major firms in the industry were always represented." *Centennial* 151-52. Moreover, it was only the "major firms"

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[35] The "McAbee Affair" in 1937 was almost an exact preview of the Hydrolevel case, but apparently the ASME learned little from the experience. McAbee, the owner of the Carbonic Gas Equipment Company, complained that a 1936 "addendum" to the Code which required that a difficult test be applied to his product was the "fruit of a conspiracy intended to drive him out of business." McAbee's competitors, whose products were not covered by this new "addendum" to the Code, made up a majority of the "special committee" which drafted the new testing rules. According to *Centennial*, McAbee successfully sued the members of the committee under the Sherman Act and when he threatened the ASME itself with a similar action, the ASME's Main Committee conveniently "interpreted" the new rules to exempt McAbee's product and thus "avoided what might have been an embarrassing and costly affair." *Centennial* 155-56.

with an interest in the Code that could afford to donate large amounts of engineering talent to the code-developing work. *Id. See also* E. Layton, *The Revolt of the Engineers* 18 (1971). This led quite naturally to the fact that,

> at a personal level the committee often acted the way clubs do. Its members usually occupied senior positions in industry, they met frequently, formed long-lasting friendships, and generally shared the same social, economic and political viewpoints. And in the way such groups work, they occasionally took care of colleagues in times of difficulty. Its older members remember more than one case in which that happened. * * * This close cooperation, with such personal, professional, and business implications to it, created in ASME's boiler code committee an institutional device of great power. * * * Over the years, many of its long-term members gave a great deal of time and energy to code work, out of a genuine sense of professional obligation. But the fact that in America a direct connection to industry continued to be an active element in the formulation of standards meant not only that the code was vulnerable to attack on the grounds of self-interest, but also that it was sometimes guilty of the charge.

Centennial 156-57 (emphasis added).

It is against this background of self-proclaimed "exemplary behavior" that the ASME asks this Court to relieve it, and other non-profit organizations like it, from liability for the anticompetitive impact of its standard-setting machinery. If instances of abuse are indeed "rare," as the ASME claims, then we see no need for such an exemption from the traditional rules of agency law. If, on the other hand, conflicts of interest are endemic, as the ASME's own history indicates, immunizing "voluntary" private standard-setting organizations from liability for the monopolistic practices of its agents would open the largest loophole in the Sherman Act since *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895). It would remove all incentive from such organizations to choose their agents with care and to supervise them properly. In fact, it would give them every incentive to close their eyes to the anticompetitive machinations of their "volunteers" and to delegate even more power to them.

Because non-profit organizations like the ASME exist only to serve the public, as we are told by the ASME, the activities of their agents could never be intended to "benefit" the organization. Therefore, under the rule urged upon this Court, no matter how serious the anticompetitive conduct, it can never be imputed to the organization because it is done, by definition, not "for the benefit" of the organization. However, non-profit corporations can do wrong as well as right under the antitrust laws, *see, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Brenner v. World Boxing Council*, ____ F. Supp. ____, [1980-81] Trade Cases (CCH) ¶ 63,789 at p. 78,217 (S.D.N.Y. 1981)(citing opinion of Court of Appeals in the instant case), and no authority supports the application of different agency principles to them.

The ASME claims that because it has no way to protect itself against such conflicting interests,[36] such liability, and the resulting financial risk, would cause it to abandon the field to government. This argument apparently had some effect on the Court of Appeals, although similar apocalyptic predictions have been routinely rejected by this Court as being more appropriately addressed to Congress than to the Courts. *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980); *United States v. Topco Associates*, 405 U.S. at 611-12; *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 196 (1963). The Courts are simply

[36] In view of the record, it is simply disingenuous for the ASME to tell this Court that the April 29, 1971 letter "would have escaped detection under any system" and that only someone with knowledge of "M&M's conspirational purposes" could detect the letter's "hidden significance." ASME Br. 37 n.*. Before he learned anything else about the case, the ASME's own expert witness immediately "detected" that the letter would have a devastating impact upon Hydrolevel. J.A. 113. Similarly, Mr. R. J. Cepluch, a Main Committee member, saw the same thing as early as May, 1972. J.A. 8. The ASME's top officers became aware of the M&M connection no later than Mr. Rymer's March 23, 1972 and have, to this day, done nothing about it despite the ASME's power and unique resources in the field. The facts clearly justify a finding that the ASME deliberately refused to take corrective action in order to protect its agents.

not equipped to deal with policy arguments such as those made by the ASME and its *amici* on behalf of "innumerable" unidentified organizations.

If, indeed, the ASME's private standard-setting programs cannot be made objective and fair, and conform to the goals of the Sherman Act, then perhaps their demise is long overdue. We do not accept, however, the doomsday threat at face value because we think it obvious that relatively few changes in how the Code is administered could avoid similar abuses in the future. Careful selection and frequent rotation of those in powerful committee positions, the appointment of a devil's advocate or ombudsman and the establishment of mandatory and meaningful internal review procedures would probably be enough in themselves. Why the ASME put Hoyt, a man whom it admits had no technical competence in the field (ASME Br. 8), in charge of supervising the "volunteers" on the code-developing committees is a question that has never been answered. Prompt, public and appropriate disciplinary measures would also deter those "volunteers" who might be tempted to abuse their positions for private purposes. Moreover, if an abuse does occur, a genuine effort to repudiate it and contain its spreading influence would also minimize the ASME's financial risk. Insurance is also surely available to cover any risk that remains.

Bankers, attorneys and stockbrokers are fiduciaries and are held to exceedingly strict standards of conduct with respect to the interests of their clients, including an absolute duty to control the conduct of their agents,[37] because those clients are in a position of total dependence upon their professional skill and objective judgment. Professional organizations which exercise regulatory power over a client industry should likewise be accountable for the conduct of their designated agents. What sort of internal procedures should be adopted to make private standard-setting or certification programs consistent with the goals of the Sherman Act and insure fairness and

[37] *See, e.g.*, Barber, *Control and Responsibility in the Professions*, Pol. Sci. Q. 599, 603-04 (Winter 1978-79); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886, 904 (1934). Whether the agent is a "volunteer" or a full-time staff member is immaterial. Either can do the same kind of damage.

objectivity but still serve their regulatory purposes has been the subject of considerable scholarly analysis,[38] governmental investigation[39] and litigation.[40] In this case, however, no matter how that standard of professional duty or responsibility is formulated, the conduct of the ASME with respect to Hydrolevel did not measure up.

B. It is Appropriate That The ASME Should Share the "Risk of Loss" In This Case

One of the underlying principles of agency law, as the ASME expressly recognizes, is to make the principal jointly liable with the agent for damage caused by that agent. This serves the public because the principal is given a strong incentive to select and supervise his agents with care. As pointed out earlier in this Brief, this is not unfair since the principal is utilizing others to perform functions that expand his power and it is not unreasonable to require the principal to be liable for an agent's *improper* acts (along with the agent), since he benefits by the agent's *proper* conduct. Moreover, because

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[38] *See, e.g.*, R. Bork, *The Antitrust Paradox*, 330-44 (1978); D. Hemenway, *Industrywide Voluntary Product Standards* (1975); L. Sullivan, *Handbook on the Law of Antitrust*, 243-52 (1977); Blecher, *Product Standards and Certification Programs*, 46 Brook. L. Rev. 223, 227 (1980); Levin, *The Limits of Self-Regulation*, 67 Colum. L. Rev. 603, 611-12 (1967).

[39] *See, e.g.*, Federal Trade Commission (Bureau of Consumer Protection), *Standards and Certification, Proposed Rule and Staff Report* (December 1978); *Voluntary Industrial Standards, Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975); United States Department of Commerce, *Voluntary Standards and Testing Laboratory Accreditation* 20 (July 1977); Legality of a Proposed Standard Certification Program, 78 F.T.C. 1628, 1629-30 (1971).

[40] *See, e.g., Gibson v. Berryhill*, 411 U.S. 564 (1973); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. People's Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Eliason Corp. v. Nat'l Sanitation Foundation*, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, ____ F. Supp. ____, [1981-82] Trade Cases (CCH) ¶ 64,243 (D. Neb. 1981); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Ore. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

agents are usually of more modest means than the principal, this rule tends to assure that an injured third party will be able to collect his damages from *someone*.

The ASME would have this Court put a *caveat* on that traditional rule solely for the benefit of non-profit corporations in antitrust cases, where the potential liability is substantial. Accordingly to the ASME, when the principal is in a more "vulnerable financial position" than the agent, the court should impose "a stricter standard of vicarious liability." ASME Br. 44. In this case, of course, that "stricter standard" would result in liability for the agent but not for the ASME. Even if it could be fairly applied, which we doubt, such a rule would stand the law of agency on its head. That law imposes liability upon the principal because he normally benefits from the agent's *proper* conduct, not because he stood to benefit from the agent's *improper* acts. Moreover, the "benefit" from those proper activities need not be financial, although in the instant case the ASME "benefitted" handsomely from the standard-setting activities of its volunteers.[41]

The agents, of course, also remain liable for their own improper acts and in this case the agents' other principals were similarly liable. We cannot assume, as the ASME does, that the members of the ASME and their full-time employers will always be less "financially vulnerable" than the ASME. The members and their employers may just as likely be judgment-proof, or, as here, the injured plaintiff may be forced to settle with fewer than all defendants for far less than his actual damages simply to keep himself out of bankruptcy and to

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[41] In 1978 the ASME had a net (non-taxable) income of over $2,300,000, from a gross income of more than $14,300,000. In that year, sixty-one percent (61%) of the ASME's gross income, or almost $9,000,000, was generated by sales of its codes and standards and its "Certification Program." At the time of trial the ASME's investment portfolio alone was worth over $15,000,000. PX 22 (HX V. 440-465)(not in evidence). This exhibit was excluded by Judge Weinstein with the understanding that the ASME would not seek to exploit its "non-profit" status before the jury. *See* App. 675-78, 710-12, 1762. As demonstrated above, these revenues are realized only by obtaining significant contributions of engineering talent from companies in the industry, a "benefit" to the ASME that wholly depends upon the perception of those companies that they are getting something in return.

"hang on" for a few more months. If the ASME's argument as to who should bear the "risk of loss" prevails, an argument that ignores the victim, the injured party's chances of being made whole are greatly diminished. Once Hydrolevel had a superior patented product, a large and loyal source of financing, a moribund market ripe for penetration, three dedicated officers willing to live on poverty-level wages for a decade while developing their business and, of course, the American Dream. Now, thanks to the ASME and its agents, it has nothing except this lawsuit. Who should bear the risk of loss? The question answers itself.

As the Court emphasized in *Bankers Life Insurance Co. v. Scurlock Oil Co.*, 447 F.2d 997, 1007 (5th Cir. 1971), a case on which the ASME inexplicably relies:

> [W]hen a principal puts his agent in a position of responsibility and gives that agent certain powers to act in the principal's behalf, third parties are entitled to rely on an agent's good faith performance of his apparent powers. And if the agent uses those powers in a deceitful manner, it is not the innocent third party who should suffer, but the principal who inflicted the deceitful agent upon the public in the first place.

That the injury inflicted is a competitive injury unlawful under the Sherman Act rather than just tortious under common law principles cannot and should not justify the creation of special exemptions to the traditional principles of *respondeat superior.*

CONCLUSION

The ASME received a fair trial and, for the foregoing reasons, the judgment of the Court of Appeals and the verdict of the jury on the issue of liability should be affirmed. Moreover, considering that the Court of Appeals improperly characterized the June 9, 1972 ASME letter as a "retraction" of the ASME's participation in the conspiracy, Hydrolevel's pending petition for a writ of certiorari, No. 80-1771, should be granted and the judgment of the Court of Appeals on the issue of damages should be reversed pursuant to Rule 23.1 of this Court, with directions to reinstate the damage verdict of the jury. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

Respectfully submitted,

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October 20, 1981

The American Society of Mechanical Engineers
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April 29, 1971

Mr. Gene Mitchell
McDonnell & Miller, Inc.
3500 North Spaulding Avenue
Chicago, Illinois 60618

Subject: Section IV Heating Boilers Code - Par. HG-605

Dear Mr. Mitchell:

The inquiry contained in your letter of April 12, 1971, was referred to the Chairman of the concerned Subcommittee who offers the following advice:

A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gauge glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass.

There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

Very truly yours,

W B Hoyt

W.B. Hoyt
Secretary

/sh

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June 9, 1972

COPY

Hydrolevel Corporation
153 Verdi Street
Farmingdale, N.Y. 11735

Attention: Mr. Russell S. Rymer, President

SUBJECT: Section IV, Heating Boilers - Par HG-605
Your Letter of March 23, 1972

File: BC 72-99

Gentlemen:

As indicated in our letter of March 27, 1972, your letter of March 23, 1972 was considered by the applicable Committees at their meeting held on May 4 and 5, 1972.

The Committee confirmed the intent of our letter to the attention of Mr. D. De Leonardis of February 8, 1972.

This will advise that there is no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605 (a). This paragraph relates itself to Par. HG-602 (b) which specifically delineates the location of the lowest visible part of the water gage glass.

If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gage glass.

Very truly yours,

ITT NO. 002414

W. B. Hoyt,
Secretary

drp/

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Asst. Secretary (SC VIII)
F.P. MODY

February 8, 1972

Hydrolevel Corporation
153 Verdi Street
Farmingdale, New York 11735

Attention: Mr. Dominick De Leonardis
Vice President

Subject: Section IV, Heating Boilers, ASME Code - Par HG-605

Dear Mr. De Leonardis:

As you requested in your letter of January 25, 1972, I am showing below, the April 29, 1971 reply of Mr. Hoyt to an inquirer on time delays of low water cut offs.

> " A low water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.
>
> " There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period."

I hope this helps clarify the intent of the subject paragraph.

Very truly yours,

R. D. Sutton

R.D. Sutton
Assistant Secretary

RDS/ef

ITT NO 002680